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# Baseball Mascots and the Law

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BASEBALL MASCOTS AND THE LAW

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## Baseball Mascots and the Law\*

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### I. INTRODUCTION

During the summer of 2015, baseball fans across Kansas intently followed the Kansas City Royals' march toward its first World Series title in a generation.<sup>1</sup> Far fewer were watching the simultaneous conclusion of the long-running legal controversy between a Royals fan, the team, and Sluggerrr, the "loveable lion"<sup>2</sup> who has been the official mascot of the Royals since 1996. This litigation involved a novel legal issue for the sport of baseball: When a fan assumes the risk that he may be injured by a foul ball, does he also assume the risk of injury from other flying objects—such as a hot dog thrown by a mascot's paw?<sup>3</sup>



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\* This paper was originally presented at the Twenty-Seventh Cooperstown Symposium on Baseball and American Culture (2015).

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1. By far the most popular team in Kansas, the Royals are the favored team in eighty-five of the state's 105 counties. See *A Map of Baseball Nation*, N.Y. TIMES (Apr. 24, 2014), <http://www.nytimes.com/interactive/2014/04/24/upshot/facebook-baseball-map.html> (fans in twelve western counties support Colorado Rockies; four southeastern counties support St. Louis Cardinals; and three southwestern counties support Texas Rangers).

2. *Sluggerrr's Den: About Sluggerrr*, MLB.COM: OFFICIAL SITE KAN. CITY ROYALS, [http://kansascity.royals.mlb.com/kc/fan\\_forum/sluggerrr\\_about.jsp](http://kansascity.royals.mlb.com/kc/fan_forum/sluggerrr_about.jsp) (last visited Oct. 2, 2016).

3. See discussion *infra* Section II.B.2.

The courtroom appearance of Sluggerrr—who in addition to this negligence action has been involved in both copyright<sup>4</sup> and trademark litigation<sup>5</sup>—is not unique. As mascots have become an increasingly larger part of the baseball experience, they have also become drawn into a variety of legal disputes.

As a whole, mascots as symbols of professional sports franchises have a relatively short history. The term “mascot” apparently traces its origins to words in medieval Latin (“masca”) and French (“mascotte”), which carried connotations of witchcraft and sorcery.<sup>6</sup> After the popularity of the 1881 French opera *La Mascotte*—featuring a fairy who brings fortune to a peasant—the word came to mean an object that brings good luck.<sup>7</sup>

In the context of baseball, the first mascots employed to bring good luck to a team were often physically disabled, deformed, or otherwise marginalized people.<sup>8</sup> During the 1908 and 1909 seasons, for example, future Hall of Famer Ty Cobb adopted an orphan named Ulysses Harrison (known as “Lil’ Rastus”) as the Detroit Tigers mascot and players would regularly rub his head before going to the plate in hopes of improving their chances of getting a hit.<sup>9</sup> In 1911, New York Giants fans would arrive early to the Polo Grounds to laugh at the antics of mentally-ill Charlie “Victory” Faust, who even pitched in two games for the team.<sup>10</sup> From 1910 to 1915, handicapped teenager Louis Van Zelst became the batboy and mascot of the Philadelphia Athletics, and

4. See *infra* notes 151–55 and accompanying text.

5. See *infra* notes 172–81 and accompanying text.

6. See Michael Veley, Dir. & Chair, Dep’t of Sport Mgmt., Syracuse Univ., Presentation at the Twenty-Seventh Cooperstown Symposium on Baseball and American Culture: Baseball Mascots: A History and Evolution of Entertaining Fans of All Ages (2015) (on file with author); *Mascot*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/mascot> (last visited Oct. 25, 2016).

7. Mark Jacob & Stephan Benzkofer, *10 Things You Might Not Know About Mascots*, CHI. TRIB. (Jan. 26, 2014), [http://articles.chicagotribune.com/2014-01-26/opinion/ct-perspec-things-0126-20140126\\_1\\_native-american-mascots-10-things-white-sox](http://articles.chicagotribune.com/2014-01-26/opinion/ct-perspec-things-0126-20140126_1_native-american-mascots-10-things-white-sox).

8. Humans are rarely referred to as “mascots” today. But see *The Leprechaun*, UND.COM: OFFICIAL SITE NOTRE DAME ATHLETICS, <http://www.und.com/trads/nd-m-fb-mas.html> (last visited Oct. 2, 2016) (student performs as leprechaun); James Riach, *Revealed: Premier League Clubs Charge up to £600 for Children to Be Mascots*, THE GUARDIAN (Dec. 18, 2014, 8:53 AM), <http://www.theguardian.com/football/2014/dec/18/premier-league-clubs-charge-600-children-mascots> (children accompanying soccer players onto the field before the match).

9. See Veley, *supra* note 6. See also Anthony Papalas, *Lil’ Rastus Cobb’s Good Luck Charm*, SABR RES. J. ARCHIVE, <http://research.sabr.org/journals/lil-rastus-cobbs-good-luck-charm> (last visited Oct. 2, 2016).

10. See Veley, *supra* note 6. See generally GABRIEL SCHECHTER, *VICTORY FAUST: THE RUBE WHO SAVED MCGRAW’S GIANTS* (2000).

players would rub his misshapen back in an effort to bring good luck.<sup>11</sup> Although this troubling behavior ended long ago, echoes of it were seen as recently as the Red Sox’s 2004 World Series run, when diminutive actor Nelson de la Rosa became a regular visitor to the team’s clubhouse.<sup>12</sup>

What we think of as baseball mascots today<sup>13</sup>—oversized costumed figures who represent a team (and to a lesser extent, graphical depictions of the same)—date to the 1960s. These now-ubiquitous franchise symbols were born in the spring of 1964, when “Mr. Met” made his debut in Shea Stadium.<sup>14</sup> Ten years later, college student Ted Giannoulas turned a radio promotion into an act that became known as “The Famous San Diego Chicken,”<sup>15</sup> the “Phillie Phanatic” followed in 1978,<sup>16</sup> and before long, *Sports Illustrated* was describing “a subculture of professional mascots and bleacher creatures that has sprung up across the land.”<sup>17</sup>

A half-century later, twenty-seven of the thirty major league franchises now have an official mascot<sup>18</sup> to entertain fans between

11. See Frank Fitzpatrick, *The Disturbing History of Baseball’s Mascots*, PHILA. INQUIRER, June 22, 2014, at E02.

12. See *Nelson De La Rosa, 38, Actor and Good-Luck Charm for Red Sox, Dies*, N.Y. TIMES (Oct. 23, 2006), <http://www.nytimes.com/2006/10/23/sports/baseball/23delarosa.html>.

13. For a 2002 overview of each team’s mascot, see Robert M. Jarvis & Phyllis Coleman, *Hi-Jinks at the Ballpark: Costumed Mascots in the Major Leagues*, 23 CARDOZO L. REV. 1635, 1636–74 (2002). For overviews of life inside the mascot suit, see generally AJ MASS, *YES, IT’S HOT IN HERE: ADVENTURES IN THE WEIRD, WOOLLY WORLD OF SPORTS MASCOTS* (2014); Patrick Hruby, *The Seedier Side of Fur and Fun*, ESPN: PAGE 2, <https://espn.go.com/page2/s/hruby/030212.html> (last visited Oct. 4, 2016).

14. See *The Story of Mr. Met*, MLB.COM: OFFICIAL SITE N.Y. METS, [http://newyork.mets.mlb.com/nym/fan\\_forum/mrmet.jsp](http://newyork.mets.mlb.com/nym/fan_forum/mrmet.jsp) (last visited Oct. 4, 2016); see also MASS, *supra* note 13, at 44–46 (describing the author’s experience performing as Mr. Met); DAN REILLY, *THE ORIGINAL MR. MET REMEMBERS: WHEN THE MIRACLE BEGAN* 35–43 (2007).

15. See *Biography*, FAMOUS SD CHICKEN, <http://www.famouschicken.com/biography.html> (last visited Oct. 4, 2016) [hereinafter THE FAMOUS SD CHICKEN].

16. Ian Crouch, *Baseball’s Worst Mascots*, NEW YORKER (Jan. 14, 2014), <http://www.newyorker.com/news/sporting-scene/baseballs-worst-mascots>; see also *The Phanatic’s Profile*, MLB.COM: OFFICIAL SITE PHILA. PHILLIES, [http://mlb.mlb.com/phi/fan\\_forum/phanatic.jsp?loc=bio](http://mlb.mlb.com/phi/fan_forum/phanatic.jsp?loc=bio) (last visited Oct. 4, 2016).

17. Bruce Newman, *Some Wild and Crazy Guys*, SPORTS ILLUSTRATED: VAULT (Sept. 17, 1979), <http://www.si.com/vault/1979/09/17/823972/some-wild-and-crazy-guys-they-dress-up-as-chickens-have-names-like-krazy-george-and-peanut-man-wear-psychedelic-wigs-and-throw-voodoo-hexes-but-whatever-it-is-with-these-quotwhateversquot-they-keep-fans-hopping> (“‘Even Elvis had his imitators,’ the Chicken says. ‘Now there are geese, kangaroos, beavers—I guess I’ve really spawned something.’”).

18. See Crouch, *supra* note 16 (excepting Dodgers, Angels, and Yankees); Dayn Perry, *It’s National Mascot Day, So Let’s Rank the Mascots of Every MLB Team*, CBSSPORTS.COM (June 17, 2016), <http://www.cbssports.com/mlb/news/its-national-mascot-day-so-lets-rank-the-mascots-of-every-mlb-team/> (ranking Cincinnati’s “Mr. Redlegs” first). The most recent addition came in 2014, when the Chicago Cubs introduced the much-criticized bear “Clark.” See Christopher Borrelli, *The*

innings, greet children in the stands, appear at corporate and community events<sup>19</sup> and promote the team on social media.<sup>20</sup> Minor league mascots are even more widespread, with names such as Spinner the Squirrel (Wichita Wingnuts),<sup>21</sup> Wool E. Bull (Durham Bulls),<sup>22</sup> Roscoe the Grease Monkey (Bowling Green Hot Rods),<sup>23</sup> Ballapeno (San Antonio Missions)<sup>24</sup> and Uncle Slam (Potomac Nationals).<sup>25</sup>

*Unbearable Lightness of Clark, the Cubs Mascot*, CHI. TRIB. (Jan. 18, 2014), [http://articles.chicagotribune.com/2014-01-18/entertainment/chi-clark-cubs-mascot-borrelli-20140117\\_1\\_chicago-cubs-clark-third-coast-comics](http://articles.chicagotribune.com/2014-01-18/entertainment/chi-clark-cubs-mascot-borrelli-20140117_1_chicago-cubs-clark-third-coast-comics) (calling Clark “the Jar Jar Binks of the North Side, the Anne Hathaway of Wrigleyville, the Berenstain Bear of Major League Baseball”); *Clark’s Crew*, MLB.COM: OFFICIAL SITE CHI. CUBS, [http://chicago.cubs.mlb.com/chc/fan\\_forum/clark.jsp](http://chicago.cubs.mlb.com/chc/fan_forum/clark.jsp) (last visited Oct. 4, 2016). The Dodgers unveiled a “unique performance character” in 2014. However, the team refused to call the oversized person in a Dodgers uniform a mascot, apparently because it did not appear on the field. Steve Dilbeck, *Oh, the Pain: Dodgers Unveil Their Non-Mascot Mascot*, L.A. TIMES (Apr. 8, 2014, 11:09 AM), <http://www.latimes.com/sports/dodgers/dodgersnow/la-sp-dn-dodgers-mascot-20140408-story.html#axzz2yK6elzJC>. The Yankees and Angels had mascots in the past. See Scott Cacciola, *Yankees’ Long-Forgotten Mascot*, WALL STREET J., June 15, 2010, at A.19 (describing “spectacular failure” of Yankees’ mascot known as “Dandy” from 1979 to 1981); Marcia C. Smith, *Contest: Show Me the Rally Monkey*, ORANGE COUNTY REG. (Sept. 1, 2011, updated Aug. 21, 2013, 1:17 PM), <http://www.ocregister.com/articles/monkey-314892-rally-angels.html> (describing Angels’ bear mascots known as “Ribbie”, “Southpaw”, “Clutch”, and “Scoop” during the 1990s).

19. See, e.g., *Book Wally*, MLB.COM: OFFICIAL SITE BOS. RED SOX, [http://boston.redsox.mlb.com/bos/fan\\_forum/wally\\_party.jsp](http://boston.redsox.mlb.com/bos/fan_forum/wally_party.jsp) (last visited Oct. 4, 2016) (Red Sox Mascot “Wally” available to attend birthdays, weddings, schools, grand openings, parades, trade shows, charity events, and more); *Married by a Mascot: Fresno Grizzlies’ Parker T. Bear Becomes Ordained Minister*, FRESNO BEE (May 24, 2016, 3:38 PM), <http://www.fresnobee.com/sports/mlb/fresno-grizzlies/article79641752.html> (minor league mascot available to perform weddings); see generally MASS, *supra* note 13, at 45–56 (responsibilities of mascots).

20. See, e.g., Bernie Brewer (@Bernie\_Brewer), TWITTER, [https://twitter.com/bernie\\_brewer](https://twitter.com/bernie_brewer) (last visited Oct. 4, 2016); Rangers Captain (@rangerscaptain), TWITTER, <https://twitter.com/rangerscaptain> (last visited Oct. 4, 2016); see also Charles Curtis, *MLB Mascots Rip Mr. Met on Twitter About Having Affair with His Wife*, NJ.COM (Mar. 11, 2014, 1:18 PM, updated Mar. 11, 2014, 2:07 PM), [http://www.nj.com/mets/index.ssf/2014/03/mlb\\_mascots\\_rip\\_on\\_mr\\_met\\_on\\_twitter\\_about\\_having\\_affair\\_with\\_his\\_wife.html](http://www.nj.com/mets/index.ssf/2014/03/mlb_mascots_rip_on_mr_met_on_twitter_about_having_affair_with_his_wife.html).

21. *Wichita Wingnuts*, 360WICHITA.COM, <http://www.360wichita.com/Entertainment/Sports/WichitaWingnuts.html> (last visited Oct. 5, 2016).

22. *Wool E.’s World*, MiLB.COM: OFFICIAL SITE DURHAM BULLS, [http://www.milb.com/content/page.jsp?ymd=20110803&content\\_id=22704494&sid=t234&vkey=team3](http://www.milb.com/content/page.jsp?ymd=20110803&content_id=22704494&sid=t234&vkey=team3) (last visited Oct. 5, 2016).

23. *Mascot & Player Appearances*, MiLB.COM: OFFICIAL SITE BOWLING GREEN HOT RODS, [http://www.milb.com/content/page.jsp?ymd=20130906&content\\_id=41567530&sid=t2498&vkey=team3](http://www.milb.com/content/page.jsp?ymd=20130906&content_id=41567530&sid=t2498&vkey=team3) (last visited Oct. 5, 2016).

24. *Mascot Mania: West*, MiLB.COM, [http://www.milb.com/milb/fans/mascot\\_mania/y2016/leaderboard\\_full\\_rd1.jsp?key=4Ln4VMmsjWXmlWARabc4fr2nGm80&run=36348](http://www.milb.com/milb/fans/mascot_mania/y2016/leaderboard_full_rd1.jsp?key=4Ln4VMmsjWXmlWARabc4fr2nGm80&run=36348) (ranking “Ballapeno” as number twenty-three in the West region) (last visited Oct. 5, 2016).

25. *Mascot Mania: East*, MiLB.COM, [http://www.milb.com/milb/fans/mascot\\_mania/y2016/leaderboard\\_full\\_rd1.jsp?key=SZXLwfpt3WS07dvWvHOzssiKKo0&run=36496](http://www.milb.com/milb/fans/mascot_mania/y2016/leaderboard_full_rd1.jsp?key=SZXLwfpt3WS07dvWvHOzssiKKo0&run=36496) (ranking “Uncle Slam” as thirty-fourth in the East region) (last

The growth and popularity of these mascots—perhaps combined with a litigious society—has also meant an increase in mascot-related legal claims. Many of these cases involve tort claims—injuries caused to or caused by mascots. But, like the rest of society, mascots have been involved in a breadth of violations, or alleged violations, of law. From trademark cases to employment disputes, criminal charges and constitutional issues, baseball mascots offer a picture of legal disputes within the game itself.

## II. MASCOTS AND TORT LAW

As both plaintiffs and defendants, mascots have been involved in numerous tort cases. They are the victims of intentional torts—often assault or battery—committed by fans or players. In addition, mascots have also been accused of committing the unintentional tort of negligence by breaching a duty of care to fans.

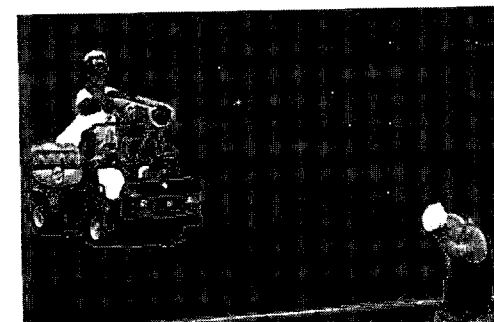


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### A. Intentional Torts: Injuries Caused to Mascots

Mascots would not seem to be involved in a dangerous profession; however, mascots—or more accurately the mascot performers—are often injured. From heat-related illness to chronic back pain, mascots are regularly hurt on the job.<sup>26</sup> But litigation most often ensues when a fan intends to, or does, cause a harmful contact to a mascot—thus

visited Oct. 5, 2016).

26. See K. W. Farmer et al., *Epidemiology of Injuries Among Professional Mascots*, 33 MED. & SCI. SPORTS & EXERCISE S82 (2001); Johns Hopkins Med., *Professional Mascots Likely to Suffer Heat Illness, Injure Knees*, EUREKALERT! (May 29, 2001), [http://www.eurekalert.org/pub\\_releases/2001-05/JHMI-Pmlt-2905101.php](http://www.eurekalert.org/pub_releases/2001-05/JHMI-Pmlt-2905101.php). The authors have been unable to locate examples of claims by mascots against employers for job-related injuries.

committing the intentional torts of assault or battery.<sup>27</sup>

A typical example occurred in 1999, when Baltimore's "Oriole Bird" was giving high fives to spectators in the right field bleachers when he was pushed onto the warning track at Camden Yards by a fan.<sup>28</sup> After his fall from a seven-foot-high platform, the Bird crawled into a groundskeepers' cage before being treated at a hospital.<sup>29</sup> John Krownapple, the mascot performer and a Maryland schoolteacher, was unable to walk without a wheelchair for forty days after suffering a broken ankle and torn ligaments and tendons.<sup>30</sup> The fan, Louis Vitagliano, was convicted of second-degree assault and reckless endangerment and ordered to pay \$60,000 in civil damages to cover Krownapple's medical expenses, lost wages, and pain and suffering.<sup>31</sup>

Sadly, this was not the first time the Bird had been attacked. Only five years prior, an intoxicated off-duty police officer repeatedly punched the mascot, crushing the costume head and causing \$500 in damages to the costume.<sup>32</sup> Although both the Orioles and the mascot performer considered pursuing the officer for damages and assault, charges were apparently never brought.<sup>33</sup>

A more recent example comes from Florida in 2013, when a fan of the visiting Boston Red Sox twice grabbed "Raymond Ray," the furry "seadog" mascot of the Tampa Bay Rays,<sup>34</sup> around the neck, pulling

27. See RESTATEMENT (SECOND) OF TORTS §§ 13, 21 (AM. LAW INST. 1965) (defining tortious battery and assault, respectively).

28. See Zerline A. Hughes, *Oriole Mascot Performer Seeks Damages in Camden Yards Fall*, BALT. SUN (July 23, 1999), [http://articles.baltimoresun.com/1999-07-23/news/9907230149\\_1\\_vitagliano-camden-yards-oriole](http://articles.baltimoresun.com/1999-07-23/news/9907230149_1_vitagliano-camden-yards-oriole); Peter Hermann, *O's Mascot Sidelined by Assault at Game*, BALT. SUN (May 7, 1999), [http://articles.baltimoresun.com/1999-05-07/news/9905070197\\_1\\_bird-orioles-maroon](http://articles.baltimoresun.com/1999-05-07/news/9905070197_1_bird-orioles-maroon) [hereinafter Hermann, *O's Mascot Sidelined*].

29. Hermann, *O's Mascot Sidelined*, *supra* note 28. Krownapple, who was injured in the middle of the ninth inning, apparently missed the tenth inning walk-off grand slam hit by Orioles designated hitter Harold Baines. See *id.* See also *Chicago White Sox vs Baltimore Orioles May 4, 1999 Box Score*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/box-scores/boxscore.php?boxid=199905040BAL> (last visited Oct. 4, 2016).

30. Hughes, *supra* note 28.

31. Caitlin Francke, *Judge Orders Man Who Pushed Oriole Bird to Pay \$60,000*, BALT. SUN (Mar. 25, 2000), [http://articles.baltimoresun.com/2000-03-25/news/0003250133\\_1\\_taylor-mascot-bleachers](http://articles.baltimoresun.com/2000-03-25/news/0003250133_1_taylor-mascot-bleachers); see also Original Judgment, *Krownapple v. Vitagliano*, No. 24C99003475 (Md. Cir. Ct. Mar. 24, 2000).

32. Peter Hermann, *N.Y. Officer Beat Orioles' Mascot, Police Say*, BALT. SUN (Aug. 5, 1995), [http://articles.baltimoresun.com/1995-08-05/news/1995217040\\_1\\_bird-suffolk-county-police-punches](http://articles.baltimoresun.com/1995-08-05/news/1995217040_1_bird-suffolk-county-police-punches) [hereinafter Hermann, *N.Y. Officer Beat Orioles' Mascot*].

33. See Hermann, *N.Y. Officer Beat Orioles' Mascot*, *supra* note 32; see also *Maryland Judiciary Case Search Criteria*, MD. JUDICIARY, <http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp> (accept terms and conditions; search party name) (last visited Oct. 5, 2016).

34. *Rays Rookies: All About Raymond*, MLB.COM: OFFICIAL SITE TAMPA BAY RAYS, [http://tampabay.rays.mlb.com/tb/fan\\_forum/rays\\_rookies.jsp](http://tampabay.rays.mlb.com/tb/fan_forum/rays_rookies.jsp) (last visited Oct. 4, 2016).

Raymond toward the railing.<sup>35</sup> While the mascot performer likely could have brought a claim for battery, the fan was instead charged with disorderly intoxication.<sup>36</sup>

Surprisingly, it is not only fans who have committed intentional torts against mascots; players have also been responsible. An early example occurred in 1984 against "perhaps the most reviled mascot in sports history"<sup>37</sup>—the San Francisco Giants' "Crazy Crab."<sup>38</sup> Throughout his inaugural season, fans were encouraged to boo and ridicule the mascot, and Crazy Crab was regularly hit by garbage thrown from the stands.<sup>39</sup> On September 24, 1984, while Crazy Crab was circling the stadium holding a faux Olympic torch to the sounds of the theme from "Chariots of Fire," two unidentified San Diego Padres allegedly grabbed Crazy Crab from behind, threw him to the ground, and began beating him.<sup>40</sup> Crazy Crab retired shortly thereafter, but not before mascot performer Wayne Doba sued the Padres for his resulting injuries and later received a reported \$2,000 settlement from the team.<sup>41</sup>

Almost twenty years later, another player attacked a mascot at the Milwaukee Brewers' Miller Park, which hosts a race after the sixth inning between the Famous Racing Sausages.<sup>42</sup> As the mascots ran around the field during a 2003 game, Pittsburgh Pirates first baseman Randall Simon reached out of the dugout with his bat and hit the Italian

35. Jasper Craven, *Needham Man Charged with Disorderly Conduct After Allegedly Grabbing Tampa Bay Rays Mascot Around the Neck*, BOSTON.COM (Sept. 12, 2013, 1:22 PM), <http://www.boston.com/metrodesk/2013/09/12/needham-man-charged-with-grabbing-tampa-bay-rays-mascot-around-the-neck/iMuqEfMAc8T6097b2ityYL/story.html>.

36. See *id.*

37. Dwight Chapin, *Lasorda Gets an Earful One More Time*, SFGATE (Sept. 30, 1999, 4:00 AM), <http://www.sfgate.com/sports/article/Lasorda-gets-an-earful-one-more-time-3065187.php>.

38. See generally *Timeline: 1980s*, MLB.COM: OFFICIAL SITE S.F. GIANTS, <http://mlb.mlb.com/sf/history/timeline.jsp> (last visited Oct. 4, 2016); 30 for 30 *Shorts: The Anti-Mascot*, ESPN (Apr. 5, 2016), <http://espn.go.com/video/clip?id=12876146>.

39. See Edvins Beitiks, *Crab Still Sealed with a Hiss*, SFGATE (Mar. 7, 1997, 4:00 AM), <http://www.sfgate.com/sports/article/Crab-still-sealed-with-a-hiss-3132145.php>.

40. See *id.*; Rich Lorenz, *Thomas Signs with Chargers*, CHI. TRIB. (Sept. 13, 1985), [http://articles.chicagotribune.com/1985-09-13/sports/8503020233\\_1\\_black-hawks-chargers-kicker-don-coryell](http://articles.chicagotribune.com/1985-09-13/sports/8503020233_1_black-hawks-chargers-kicker-don-coryell). The players were later identified as Kurt Bevacqua and future Giants manager Bruce Bochy. See *Which Padres Players Attacked the Crazy Crab?: Download*, MIGHTY 1090AM (May 28, 2015), <http://www.mighty1090.com/episode/which-padres-players-attacked-the-crazy-crab/> (audio recording of radio broadcast).

41. See Beitiks, *supra* note 39. Fifteen years later, Crazy Crab returned for the final night game at Candlestick Park, where fans had one last chance to boo the crustacean as well as former Dodgers manager Tommy Lasorda. See Chapin, *supra* note 37.

42. See *The Famous Racing Sausages™*, MLB.COM: OFFICIAL SITE MILWAUKEE BREWERS, [http://milwaukee.brewers.mlb.com/mil/fan\\_forum/racing\\_sausages.jsp](http://milwaukee.brewers.mlb.com/mil/fan_forum/racing_sausages.jsp) (describing history of races between Brat, Polish Sausage, Italian Sausage, Hot Dog, and Chorizo) (last visited Oct. 5, 2016).

Sausage on the head.<sup>43</sup> Mandy Block, the 19-year-old performer wearing the sausage costume, tripped and fell in front of the dugout, scraping her knees.<sup>44</sup> After the game, Simon was arrested for battery.<sup>45</sup> The charges were later reduced to disorderly conduct, and Simon was fined \$432.<sup>46</sup> Block did not press charges, asking only that Simon autograph and give her the bat;<sup>47</sup> she did, however, receive both a certificate of bravery from the National Hot Dog & Sausage Council and a trip to Curacao—Simon's Caribbean island home—from the Curacao Tourism Board.<sup>48</sup>

### B. Negligence: Injuries Caused by Mascots

The law of negligence, with all its ramifications and complexities, plays an important role in baseball. The claims range from the fan hit by a foul ball to the second baseman injured by an intentionally vicious slide, from the consumer complaining of contaminated food to the player alleging an invasion of his privacy. Common law rules, contractual modifications and statutory alterations may be applicable and controlling. Compensation for physical injuries, physical pain and suffering, mental anguish, and financial losses may be sought. Egregious facts may support claims for punitive damages.

Interested parties may include the player, other individuals, the baseball team, the owner of the stadium, independent contractors and third parties providing services at the stadium, and media outlets broadcasting or publicizing the game. Although this paper is limited to claims involving the mascot, these other parties are often sued by hopeful plaintiffs,<sup>49</sup> often based upon a respondeat superior theory.

In the context of baseball, the general elements of negligence—duty, breach, causation, and damages—have been somewhat modified. Based on the theories of assumption of risk and contributory negligence, courts have adopted the “baseball rule” to limit the duty of care owed by teams and stadiums to plaintiff-fans.<sup>50</sup> Modern judicial interpretations have

43. Paul Meyer, *Simon's Sausage Beef Is Over*, PITT. POST-GAZETTE, July 11, 2003, at B-1.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Block Will Relish Her Memories as a Sausage*, ESPN (May 9, 2004), <http://sports.espn.go.com/mlb/news/story?id=1798229>.

49. See, e.g., *Praecepte for Summons at 1*, *Crass v. Phillies*, No. 100503283 (Pa. Ct. Com. Pl. July 18, 2011).

50. For a discussion of the development of the baseball rule, see *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶¶ 17–42, 148 N.M. 646, 241 P.3d 1086, *overruled by Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, 326 P.3d 465.

stated that fans assume only the inherent risks of the game.<sup>51</sup>

### 1. Direct Contact

Any proper examination of negligence claims involving mascots should begin in Philadelphia. The “Phillie Phanatic”—a “feathery green creature”<sup>52</sup> with “clumsy feet” and an “extra long beak”<sup>53</sup>—has been called the most-sued mascot in baseball since 2002,<sup>54</sup> and there is no evidence that he has lost his title.

A 1993 incident involving the Phanatic is typical of mascot-inflicted injuries, in which a mascot comes into contact with a fan while performing. At a game between the Phillies and the Reds, the Phanatic was entertaining the crowd in the stands when he kicked fan Felicia Glick in the back and shoved her head forward.<sup>55</sup> Glick, who was five months pregnant at the time, sued the Phillies in federal court to recover more than \$1 million for her resulting back and neck injuries.<sup>56</sup> Although a jury ruled in favor of the plaintiff, it awarded Glick only \$25,000, effectively giving the Phillies the win.<sup>57</sup>

Fifteen years later, the Phanatic was appearing at the Phillies' AA minor league affiliate in Reading, Pennsylvania when it injured another fan.<sup>58</sup> Seventy-five year old Grace Crass was attending the game with a

51. See *id.* at ¶ 39 (courts generally allow juries to decide whether a duty was breached in cases when a stadium owner or occupant has acted to increase a risk beyond those necessary or inherent to the game, or to impede a fan's ability to protect himself).

52. *Press Release: Phillie Phanatic Among Five Philadelphians Honored with 'Great Friend to Kids Awards'*, MLB.COM: OFFICIAL SITE PHILA. PHILLIES (Nov. 20, 2009, 11:36 AM), [http://philadelphia.phillies.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20091120&content\\_id=7693272&vkey=pr\\_phi&text=.jsp&cc\\_id=phi](http://philadelphia.phillies.mlb.com/news/press_releases/press_release.jsp?ymd=20091120&content_id=7693272&vkey=pr_phi&text=.jsp&cc_id=phi).

53. *The Phanatic's Profile*, *supra* note 16; see also Mike Rubin, *Master of Puppets*, VICTORY J., <http://victoryjournal.com/stories/master-of-puppets> (discussing the creation of mascots) (last visited Oct. 5, 2016). The Phanatic has also been dubbed the most popular mascot in baseball. See Christina Settimi, *Baseball's Most Popular Mascots*, FORBES (Mar. 28, 2016, 10:42 AM), <http://www.forbes.com/sites/christinasettimi/2016/03/28/baseballs-most-popular-mascots/#58c434917ae8>; see also *Press Release, Public Policy Polling, Pennsylvania Close; Sanders Supporter Unity Would Make It Not Close* (June 8, 2016), [http://www.publicpolicypolling.com/pdf/2015/PPP\\_Release\\_PA\\_60816.pdf](http://www.publicpolicypolling.com/pdf/2015/PPP_Release_PA_60816.pdf) (finding Pennsylvania voters believe the Phanatic is more qualified to be President than 2016 Republican presidential nominee Donald Trump).

54. See *Jarvis & Coleman*, *supra* note 13, at 1661.

55. See Jim Smith, *Finally, a Win for Phillies Suit vs. Phanatic Nets Only \$25,000*, PHILA. DAILY NEWS, Oct. 1, 1996, at 16.

56. *Jury Awards \$25,000 in Lawsuit Against Phillies Mascot*, AP NEWS ARCHIVE (Oct. 1, 1996), [http://www.apnewsarchive.com/1996/Jury-Awards-\\$25-000-in-Lawsuit-Against-Phillies-Mascot/id-156999894d1c25d5a5991b258b6d6975](http://www.apnewsarchive.com/1996/Jury-Awards-$25-000-in-Lawsuit-Against-Phillies-Mascot/id-156999894d1c25d5a5991b258b6d6975).

57. *Id.*

58. See Stephanie Farr, *Big Green Litigation Machine*, PHILA. DAILY NEWS, June 30, 2010, at 6.

church group when the Phanatic climbed into the stands and onto her legs.<sup>59</sup> She immediately experienced pain, and her asymptomatic arthritis soon flared up, resulting in the need for medical treatment and knee replacements.<sup>60</sup> Crass sued the Phillies, performer Tom Burgoyne, and others for \$50,000.<sup>61</sup> In July 2011, a jury ruled for the Phillies.<sup>62</sup>

Unlike most mascots, the Phanatic has also had to defend himself against numerous allegations of wrongdoing away from the stadium. In 1991, for example, the Phanatic jumped on a sixty-eight year old man at a church fair.<sup>63</sup> Carl Seidel, a lifelong Phillies fan, reinjured his back and sued the team for \$525,000.<sup>64</sup> He was awarded \$128,000 in 1995.<sup>65</sup>

In 1994, the Phanatic attended the grand opening of a Philadelphia-area paint store.<sup>66</sup> Store manager Charles Donoghue was seated at the festivities when the Phanatic surprised him with a bear hug.<sup>67</sup> Trying to get away, Donoghue twisted his back and suffered a herniated disk, followed by multiple back surgeries.<sup>68</sup> A court awarded him \$2.5 million in damages in 1998.<sup>69</sup>

Most recently, in 2010, Suzanne Peirce was relaxing at a hotel pool at a New Jersey beach resort.<sup>70</sup> The Phanatic, who was entertaining hotel guests, allegedly picked up her chair and tossed both the chair and Peirce into the pool.<sup>71</sup> Peirce's civil complaint claimed the incident caused damage to her "head, neck, back, body, arms and legs, bones, muscles, tendons, ligaments, nerves and tissues."<sup>72</sup> The case was settled on confidential terms in 2014.<sup>73</sup>

Although the Phanatic has been the subject of much litigation, he is

59. *Id.*

60. *Id.*

61. *Id.*

62. See Common Pleas Court of Philadelphia Trial Division - Civil Trial Worksheet at 1, Crass v. Phillies, No. 100503283 (Pa. Ct. Com. Pl. July 18, 2011).

63. See L. Stuart Ditzen, *Either Mascot's Gut or Nose, Man Says, Marred His Life a Phanatic Encounter*, PHILA. INQUIRER, May 11, 1995, at A1.

64. See *id.*

65. Gloria Campisi, *Phanatical Act Costs \$2.5m Man Was Injured by Mascot Hug*, PHILA. DAILY NEWS, Aug. 6, 1998, at 9.

66. See *id.*

67. See *id.*

68. *Id.*

69. *Id.*

70. See Jon Campisi, *Pa. Woman Sues Phila. Phillies and Phillie Phanatic Mascot over Pool-Tossing Incident*, PENN REC. (June 13, 2012, 7:59 AM), <http://pennrecord.com/stories/510552226-pa-woman-sues-philadelphia-phillies-and-phillie-phanatic-mascot-over-pool-tossing-incident>.

71. *Id.*

72. Civil Action Complaint at ¶ 7, Peirce v. Burgoyne, No. 120601293 (Pa. Ct. Com. Pl. June 7, 2012), 2012 WL 12033360.

73. Matt Fair, *Phillies Reach Settlement in Phanatic Injury Case*, LAW360 (July 3, 2014, 5:54 PM), <http://www.law360.com/articles/554487/phillies-reach-settlement-in-phanatic-injury-case>.

not the only mascot to be hauled into court for injuring a fan. After a 1997 game in Baltimore, Vincent Minervini sued the Orioles, Oriole Bird mascot performer Jeff Gartner, and other parties for \$35 million after the Bird allegedly "struck him with his tail, pushed him in the chest and took his property."<sup>74</sup> Additionally, Minervini claimed he was mishandled by policemen and an usher and suffered unspecified physical injuries.<sup>75</sup> In 2002, Minervini's claims were denied on all counts.<sup>76</sup>

In 2013, plaintiff Beth Fedornak was at a Miami Marlins game when "Bob the Shark," one of the participants in the team's mascot race, "approached her and pretended to bite her" on the head.<sup>77</sup> After Bob's bite, Fedornak "felt immediate pain in her neck after the impact of the shark head down on the top of her skull."<sup>78</sup> Two years later, she sued the Marlins, alleging that the event caused over \$86,000 in neck and back injuries.<sup>79</sup> Based primarily on a negligence claim, the suit alleged that the Marlins had a duty to safely operate the stadium by not injuring fans; that the team breached that duty by failing to hire, train, and supervise its mascots; and that the plaintiff was injured as a result of that breach.<sup>80</sup> The case is still pending as of late 2016.<sup>81</sup>

Why does interaction with mascots cause injury and induce litigation? At least three reasons are likely responsible. First, on a basic level, a mascot's costume is large, unwieldy, and makes it difficult for a performer to see.<sup>82</sup> Some injuries may occur simply because of the nature of the mascot costume. Second, a mascot is potentially a target for publicity-seeking plaintiffs or attorneys, who dream of huge jury awards after a fan is tackled by a large cartoonish character. These cases

74. See *Oriole Bird Mascot Sued*, ESPN (Sept. 6, 1999, updated Sept. 7, 1999, 7:25 PM), <http://a.espncdn.com/mlb/news/1999/0906/42783.html>.

75. See *id.*

76. To view docket of Minervini v. Balt. Orioles, Inc., No. 24C99004260 (Md. Cir. Ct. Apr. 8, 2002), see *Maryland Judiciary Case Search*, MD. JUDICIARY, <http://casesearch.courts.state.md.us/casesearch/> (accept terms and conditions; search by plaintiff's name; follow hyperlink "24C99004260") (last visited Oct. 6, 2016).

77. Rebeca Piccardo, *Woman Sues Miami Marlins for 'Shark' Attack*, MIAMI HERALD (July 3, 2015, 6:44 PM), <http://www.miamiherald.com/news/local/community/miami-dade/article26420557.html>.

78. Complaint at ¶ 11, Fedornak v. Miami Marlins, LP, No. 2015-013360-CA-01 (Fla. Cir. Ct. filed June 12, 2015), 2015 WL 4086445.

79. Piccardo, *supra* note 77.

80. See Complaint, *supra* note 78, at ¶¶ 15-18.

81. To view docket of Fedornak v. Miami Marlins, LP, 2015-013360-CA-01 (Fla. Cir. Ct. filed June 12, 2015), see *Miami-Dade County, Civil, Family and Probate Courts Online System*, HARVEY RUKIN CLERK OF THE COURTS MIAMI-DADE COUNTY, FLA., <https://www2.miamidadeclerk.com/ocs/Search.aspx> (follow "Standard Search" hyperlink; then search by party name "Fedornak" and by case type "Other Negligence") (last visited Oct. 10, 2016).

82. See generally MASS, *supra* note 13 (describing difficulties of seeing while in costume).



invariably bring media attention, which in turn may—in the eyes of plaintiffs—encourage favorable jury awards or settlements. A final contributing factor may be the lack of formal training or safety guidelines for mascots.<sup>83</sup> While industry-wide guidelines may not prevent injury at the ballpark, they could set important standards for what is expected mascot behavior.

## 2. Objects

Of course, mascots do not only entertain the crowd while close enough to directly touch fans. In addition to injury by direct contact, mascots have injured fans (and been sued) by throwing or launching objects into the stands.

A prime example comes from Florida, where the “occasionally clumsy” but “good-natured prankster” known as “Billy the Marlin” joined the Miami franchise in 1993.<sup>84</sup> Seven years later, on July 20, 2000, Billy ran onto the field at Pro Player Stadium after a fifth inning Marlin home run and began shooting souvenir t-shirts into the stands with a pressurized gun.<sup>85</sup> After one shirt flew into the upper deck, seventy-six-year-old World War II veteran Saul Shechter turned to speak to his date.<sup>86</sup> When he did so, another shirt hit him in the face and knocked him over a seat.<sup>87</sup> The injury caused permanent blurred vision and optic nerve damage, and Shechter sued the franchise for \$250,000 in damages.<sup>88</sup> At the trial, the jury took two days to side with the team, finding no negligence.<sup>89</sup>

In Kansas City, the Royals’ lion mascot, “Sluggerrr” does not shoot t-shirts from a gun—he shoots hot dogs.<sup>90</sup> In September 2009, longtime Royals fan John Coomer was cheering from a seat six rows behind the

83. See Stephanie Kuzdym, *Sport Mascots Risk Life, Limb and Lawsuits Mostly Without Regulations*, WASH. POST (May 24, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/05/24/sport-mascots-risk-life-limb-and-lawsuits-mostly-without-regulations>.

84. *Billy the Marlin*, MLB.COM: OFFICIAL SITE MIAMI MARLINS, [http://miami.marlin.mlb.com/mia/community/fla\\_community\\_billy.jsp](http://miami.marlin.mlb.com/mia/community/fla_community_billy.jsp) (last visited Oct. 6, 2016).

85. See Jeff Shields, *Lawsuit: Flying T-Shirt Injured WWII Veteran at Marlins Game*, SUN SENTINEL (Jan. 23, 2001), [http://articles.sun-sentinel.com/2001-01-23/news/0101230176\\_1\\_shechter-billy-s-get-well-card-florida-marlin-mascot](http://articles.sun-sentinel.com/2001-01-23/news/0101230176_1_shechter-billy-s-get-well-card-florida-marlin-mascot); see also *Shechter v. S. Fla. Stadium Corp.*, No. 2001-006720-CA-01 (Fla. Cir. Ct. Aug. 16, 2002).

86. See Shields, *supra* note 85.

87. *Id.*

88. Jodie Needle, *Marlins Mascot Gets No Decision So Far*, SUN SENTINEL (Aug. 16, 2002), [http://articles.sun-sentinel.com/2002-08-16/news/0208160181\\_1\\_saul-shechter-t-shirts-florida-marlin-mascot](http://articles.sun-sentinel.com/2002-08-16/news/0208160181_1_saul-shechter-t-shirts-florida-marlin-mascot).

89. See Jodie Needle, *Miami Jury Rules for Marlins Mascot*, SUN SENTINEL (Aug. 17, 2002).

90. See *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 188 (Mo. 2014).

visitor’s dugout, when Sluggerrr began shooting hot dogs into the stands.<sup>91</sup> While the gun was being reloaded, Sluggerrr threw a hot dog (apparently behind his back) into the stands, striking the unsuspecting Coomer in the eye, detaching his retina, and causing other visual problems.<sup>92</sup>

Coomer then sued the team for negligence, arguing that “the risks created by a mascot throwing promotional items” were not inherent to the game;<sup>93</sup> the team responded by arguing that Coomer had assumed the broader risk of being struck by objects from the field of play.<sup>94</sup> The trial court ruled for the Royals on all counts.<sup>95</sup>

At the appellate level, however, Coomer obtained victory on the most important point—that of primary implied assumption of risk.<sup>96</sup> Even though the Hotdog Launch was a long-running tradition at Royals games, the risk was not “in the nature of the sport itself.”<sup>97</sup> “[T]he risk of being hit in the face by a hot dog is not a well-known incidental risk of attending a baseball game.”<sup>98</sup>

When this decision was appealed in July 2014, the Missouri Supreme Court also sided with Coomer:

The Hotdog Launch is not an inherent part of the game; it is what the Royals do to entertain baseball fans when there is no game for them to watch. Sluggerrr may make breaks in the game more fun, but Coomer and his 12,000 rain-soaked fellow spectators were not there to watch Sluggerrr toss hotdogs; they were there to watch the Royals play

91. *Id.* at 188–89.

92. *Id.* at 189.

93. *Coomer v. Kan. City Royals Baseball Corp.*, Nos. WD 73984, WD 74040, 2013 WL 150838, at \*3 (Mo. Ct. App. Jan. 15, 2013), *transferred*, 437 S.W.3d 184 (Mo. 2014).

94. *See id.*

95. *See id.* at \*1.

96. *Id.* at \*3.

97. *Id.*

98. *Id.*

baseball.<sup>99</sup>

Since this risk was not inherent to the game, the Royals owed fans a duty to use reasonable care to conduct such a hot dog launch.<sup>100</sup>

The case was remanded to the trial court for a determination of whether, in this case, Sluggerrr and the Royals did use such reasonable care.<sup>101</sup> At the retrial in 2015, a jury found neither party at fault, and Coomer decided to drop his legal efforts.<sup>102</sup>

### 3. Distraction

Finally, some injuries have resulted when a fan was not directly harmed by the mascot. In these cases, a fan was injured by a foul ball and claims that the assumption of risk doctrine should not apply to bar his recovery because the mascot distracted him from watching the game.

The first and most important case on mascot distraction occurred in the California minor leagues in 1994 when fan John Lowe was attending a game between the Rancho Cucamonga Quakes and the San Bernardino Spirit.<sup>103</sup> During the seventh inning, the Quakes' mascot, a seven-foot tall dinosaur named "Tremor" began performing in the aisle behind Lowe's seat.<sup>104</sup> Lowe felt something hit his head and shoulders and

99. Coomer v. Kan. City Royals Baseball Corp., 437 S.W.3d 184, 203 (Mo. 2014). For other discussions of the case, see Channing White, Coomer v. Kansas City Royals Baseball Corp.: *Come and Have Fun Watching America's Pastime! (At Your Own Risk)*, 22 SPORTS LAW. J. 281 (2015); Ross H. Freeman, Note, *The (Hot) Dog Days of Summer: Missouri's "Baseball Rule" Takes a Strike* Coomer v. Kansas City Royals Baseball Corp., 437 S.W.3d 184 (Mo. 2014) (en banc), 80 MO. L. REV. 559 (2015); Joshua D. Winneker et al., *Who Let the Dogs Out: Should a Stadium Owner Be Held Liable for Injuries Sustained from a Mascot's Errant Hot Dog Toss?*, 21 JEFFREY S. MOORAD SPORTS L.J. 369 (2014); Shelby Hewerdine, Note, John Coomer v. Kansas City Royals Baseball Corporation: *Baseball Spectators Do Not Assume the Risk of Hotdog Injury*, 59 ST. LOUIS U. L.J. ONLINE 7 (Oct. 21, 2014), <http://www.slu.edu/colleges/law/journal/john-coomer-v-kansas-city-royals-baseball-corporation-baseball-spectators-do-not-assume-the-risk-of-hotdog-injury/>.

100. Coomer, 437 S.W.3d at 203–04.

101. *Id.* at 206.

102. Brian Burnes, *Jury Clears Royals Once Again in Sluggerrr Hot Dog Toss That Ended Badly*, KAN. CITY STAR (June 17, 2015, 2:11 PM), <http://www.kansascity.com/news/local/article24791023.html>. See also Judgment at 1, Coomer v. Kan. City Royals Baseball Corp., No. 1016-CV04073 (Cir. Ct. Jackson Cty., Mo. June 26, 2015). To view "Judgment" document, see *Your Missouri Courts*, MO. CASE.NET, <https://www.courts.mo.gov/casenet/cases/searchCases.do?searchType=name> (enter: "Coomer" into "Last Name," "John" into "First Name," and "2010" into "Year Case Filed;" follow "1016-CV0402" hyperlink; click "Civil Judgments" tab; follow "Judgment Entered" hyperlink) (last visited Oct. 7, 2016).

103. Lowe v. Cal. League of Prof'l Baseball, 65 Cal. Rptr. 2d 105, 106 (Cal. Dist. Ct. App. 1997).

104. See *id.*

turned around to see Tremor's tail; when Lowe turned back to the field, he was immediately hit in the face by a foul ball.<sup>105</sup> Lowe's serious injuries included a broken nose and cheekbone, nerve damage and other dental problems.<sup>106</sup>

Lowe sued the California League of Professional Baseball (doing business as the Quakes) to recover damages for his injuries, but the San Bernardino County Superior Court ruled against him.<sup>107</sup> Based on the doctrine of primary assumption of risk, the trial court granted summary judgment for the team, ruling that the team had no duty to protect spectators from foul balls.<sup>108</sup>

When Lowe appealed, the appeals court identified the primary issues as whether Tremor's act increased the inherent risk of injury to spectators, and whether the risk leading to injury involved an integral part of the game.<sup>109</sup> Foul balls cannot be eliminated from the game; in contrast, "the antics of the mascot are not an essential or integral part of the playing of a baseball game."<sup>110</sup> This was particularly true because games had been played when Tremor had not been present.<sup>111</sup>

As a result, the appeals court reversed the grant of summary judgment, remanding the case to the trial court for a determination of whether Tremor's act had increased the risk of injury to Lowe.<sup>112</sup> However, shortly after the appeals court ruling, Lowe and the team reached an undisclosed settlement and the case was closed.<sup>113</sup>

Less than a year after Lowe was injured in California, a similar case arose in Michigan. Only two months after his "birth" in May 1995, the Detroit Tigers mascot, "PAWS," was present at a game in which a foul ball injured fan Stephen Madaffer's neck and jaw.<sup>114</sup> Madaffer sued the

105. See *id.*

106. Judy Greenwald, *Fan Hit by Foul Baseball to Sue*, BUS. INS. (Sept. 28, 1997, 12:01 AM), <http://www.businessinsurance.com/article/19970928/ISSUE01/10009633>.

107. See Lowe, 65 Cal. Rptr. 2d at 106.

108. *Id.* at 114–21. See also Judgment of Dismissal, Lowe v. Cal. League of Prof'l Baseball, No. RCVRS14854 (Cal. Super. Ct. San Bernardino Cty. filed Jan. 16, 1996).

109. Lowe, 65 Cal. Rptr. 2d at 111. This analysis has also been applied to other injury claims. See Rawlins v. Cleveland Indians Baseball Co., 2015-Ohio-4587, 48 N.E.3d 136, at ¶¶ 12–27 (examining whether team increased inherent risk of injury when spectator was distracted by ushers asking fans to vacate seats in preparation for postgame fireworks show), *appeal denied*, 145 Ohio St. 3d 1459, 2016-Ohio-2807, 49 N.E.3d 321.

110. Lowe, 65 Cal. Rptr. 2d at 111.

111. *Id.*

112. *Id.* at 112.

113. See Maureen Cavanaugh, *Legal Update: When Bad Things Happen to Good Fans*, KPBS (Apr. 5, 2011), <http://www.kpbs.org/news/2011/apr/05/legal-update-when-bad-things-happen-good-fans> (KPBS Radio broadcast and transcript).

114. Jarvis & Coleman, *supra* note 13, at 1646–47. See also Fred Girard, *Metro Arenas Shell Out Millions for Fans Hurt by Hidden Dangers*, DET. NEWS, Jan. 29, 1998, at A1.

team, arguing that he was injured because he was watching PAWS instead of the game.<sup>115</sup> Although a mediation panel recommended a settlement of \$45,000, the team instead decided to defend in court.<sup>116</sup> The Tigers' decision was a wise one—a jury reportedly ruled for the team after only three minutes, finding that PAWS was not a "purposeful distraction."<sup>117</sup> A judge later ordered Madaffer to pay the Tigers \$8,650 in attorneys' fees and costs.<sup>118</sup>

Another suit originated in Philadelphia in 2001 and again involved the Phillie Phanatic. On June 26, 2001, Ronald and Kathryn Khorri were cheering for the Phillies near the home dugout.<sup>119</sup> During the seventh inning, the Phanatic climbed onto the dugout and waved his arms toward the Atlanta Braves infielders in an attempt to "hex" the visiting team.<sup>120</sup> When nearby fans yelled at the Phanatic, the Kohris turned to look at the fans; as they did so, they were struck by a foul ball, and Ronald Khorri suffered serious injuries to his eyes, face, and teeth.<sup>121</sup>

The Kohris' argument was simple. The Phanatic acted while the ball was in play; therefore the Phillies had a duty to warn fans of an increased risk of harm caused by the distracting mascot.<sup>122</sup> The Phillies responded that the Phanatic's actions were not extraordinary, and the general "no duty" rule did not require the team to warn fans of the usual risks and distractions present at a game.<sup>123</sup>

The trial court granted summary judgment for the team, refusing to find an exception to the "no duty" rule. "[W]hen a person attends a baseball game and sits in the stands, he or she must be forever vigilant and cannot use the excuse that the spectator's attention was drawn from the field of play due to activities which are generated by the crowd."<sup>124</sup> The decision was affirmed by the state's higher courts.<sup>125</sup>

115. Jarvis & Coleman, *supra* note 13, at 1647.

116. *Id.*

117. *Id.*

118. *Id.*

119. Brief for Appellants & Reproduced Record at 6, Kohri v. Phillies L.P., No. 01165EDA04 (Pa. Super. Ct. Nov. 29, 2004), 2004 WL 2559731.

120. See Appellees the Phillies, L.P. & Thomas Burgoyne's Brief in Opposition to Appeal at 6-7, Kohri v. Phillies LP, No. 01165EDA04 (Pa. Super. Ct. Nov. 29, 2004), 2004 WL 2559730 [hereinafter Brief for Appellees].

121. See Brief for Appellants & Reproduced Record, *supra* note 119, at 6-7.

122. See *id.* at 10, 17-20.

123. Brief for Appellees, *supra* note 120, at 3-5.

124. Brief for Appellants & Reproduced Record, *supra* note 119, at 18 (quoting trial court opinion).

125. See Kohri v. Phillies, LP, No. 1165 EDA 2004, 2004 Pa. Super. LEXIS 4849 (Pa. Super. Ct. Nov. 29, 2004), *appeal denied*, 2005 Pa. LEXIS 2332 (Pa. Oct. 25, 2005).

Another fan sued the Famous San Diego Chicken<sup>126</sup> after events at a 2004 game in Dayton, Ohio.<sup>127</sup> The Dayton Dragons, a Single-A affiliate of the Cincinnati Reds, had engaged the Famous Chicken to entertain the crowd at a June 16, 2004 game.<sup>128</sup> Grace Harting was seated directly behind the third base dugout when a foul ball struck her in the head, knocking her unconscious.<sup>129</sup> In 2005, Harting filed suit against the Dragons and the Chicken, alleging that the defendants were responsible for her personal injuries.<sup>130</sup>

Harting did not dispute that she assumed the general risk of being hit by a foul ball; rather, she believed that "the distraction caused by the presence of the Chicken while the game was being played was such that she was absolved from any legal obligation to be on the watch for foul balls entering the stands."<sup>131</sup>

After the trial court granted summary judgment for both the Chicken and the Dragons, Harting appealed.<sup>132</sup> The appeals court found that the plaintiff clearly knew of the risks of attending a game; moreover, she, and other fans, had been warned of the dangers of foul balls by both her ticket and public address announcements.<sup>133</sup> Harting essentially ignored these warnings, the court reasoned: "Had Harting been paying attention, she would have had a clear view of the action taking place in the game and [had] an opportunity to avoid the foul ball. Instead, Harting was watching the Chicken."<sup>134</sup>

In the Ohio court's view, fans should expect to observe mascots at a sporting event, given the prevalence of such entertainment. Harting understood the risks of attending a game; the Dragons warned fans of the risks; and Harting had a duty to pay attention to the game, whether or not she was distracted by the Chicken.<sup>135</sup>

Although these cases come from different jurisdictions and are fact-specific, they can be generally distinguished based on the fan's focus and

126. Like the Phanatic, the Chicken has been involved in multiple lawsuits. See *infra* Parts III, IV. In addition to his baseball-related suits, the Chicken was assessed over \$300,000 in damages after tackling a Chicago Bulls cheerleader during a 1991 game. See 'San Diego Chicken' Lays an Egg, CHI. TRIB. (May 2, 1996) [http://articles.chicagotribune.com/1996-05-02/news/9605030156\\_1\\_ted-giannoulas-san-diego-chicken-cheerleader](http://articles.chicagotribune.com/1996-05-02/news/9605030156_1_ted-giannoulas-san-diego-chicken-cheerleader).

127. See Harting v. Dayton Dragons Prof'l Baseball Club, L.L.C., 171 Ohio App. 3d 319, 2007-Ohio-2100, 870 N.E.2d 766, at ¶¶ 1-4 (2d Dist.).

128. See *id.* at ¶ 2.

129. *Id.* at ¶¶ 2-3.

130. *Id.* at ¶ 4.

131. *Id.* at ¶ 11.

132. *Id.* at ¶ 5.

133. *Id.* at ¶¶ 17-19.

134. *Id.* at ¶ 50.

135. *Id.* at ¶ 53.

the mascot's actions when the injury occurred. When the fan is primarily watching the mascot (as with PAWS, the Phanatic, and the Famous San Diego Chicken), it is more difficult to recover on a negligence theory;<sup>136</sup> when the fan is primarily watching the game (as with Tremor), he can attempt to show that the mascot's act increased the risk of injury.<sup>137</sup> Another distinction may lie in the contact between the mascot and fan—if direct contact between the mascot and plaintiff occurred (as with Tremor),<sup>138</sup> the mascot and team may bear more liability.

### III. MASCOTS AND INTELLECTUAL PROPERTY LAW

Intellectual property law protects creativity, and that protection is manifested in the law of patents, copyrights, trademarks and trade secrets. Under the common law and the federal Lanham Act,<sup>139</sup> baseball teams protect their names, their logos, their designs, and their marks. When those are stolen, misused or infringed, clubs may seek legal and equitable remedies. Sometimes they do so most aggressively. For example, the Los Angeles Dodgers sued a small bar in New York City that labelled itself "The Brooklyn Dodger Sports Bar" and adorned its facility with images of the glory days of the Boys of Summer.<sup>140</sup>

Intellectual property protection has significant financial benefits for the baseball team in general. Even if looking only at the issue of mascots, the revenue generated from the licensing of mascots is substantial.<sup>141</sup> As baseball mascots have gone from rare or occasional to expected and omnipresent, teams have trademarked their mascots and then litigated to protect their trademarks.

#### A. Copyright Infringement

As a fixed original work of authorship, the written materials of a

136. See *supra* notes 114–35 and accompanying text.

137. See *supra* notes 103–13 and accompanying text.

138. See *supra* notes 103–06 and accompanying text.

139. 15 U.S.C. §§ 1051–1141n (2012).

140. See *Major League Baseball Props., Inc. v. Sed Olet Denarius, Ltd.*, No. 90 CIV. 2170, 1990 WL 151094, at \*1 (S.D.N.Y. Oct. 5, 1990); see also Howard W. Brill, *The Name of the Departed Team: Who Can Use It?*, 15 WHITTIER L. REV. 1003, 1008–12, 1010 n.38 (1994) (citing ROGER KAHN, *THE BOYS OF SUMMER* (1971)) (discussing the 1950s Brooklyn Dodgers "Boys of Summer" reference).

141. See generally Ruth H. Alexander, *The Economic Impact of Licensing Logos, Emblems and Mascots*, 5 J. LEGAL ASPECTS SPORT 28 (1995) (describing the economic impact of mascot licensing); David Krell, *Mascots: Handle With Care*, in *IN THE ARENA: A SPORTS LAW HANDBOOK* 335–56 (Elissa D. Hecker & David Krell eds., 2013) (providing sample mascot licensing agreement).

baseball team—whether a media guide, a web page or an operating manual—may be subject to federal copyright protection.<sup>142</sup> In some cases, other parties have sued teams under federal copyright law for allegedly misappropriating copyrighted materials.<sup>143</sup> In the context of mascots, disputes have arisen over which party first authored a mascot plan or design.

For example, when the expansion Colorado Rockies played its first game in the major leagues in 1993, the team had no mascot.<sup>144</sup> However, during construction of Coors Field, the team's permanent home, the Rockies announced that a giant dinosaur egg had been unearthed; on April 16, 1994, a "lovable, purple dinosaur" known as "Dinger" "hatched" from the egg.<sup>145</sup>

Two years later, however, Akmad Company of Aurora, Colorado filed a copyright infringement suit against the Rockies in federal court.<sup>146</sup> Akmad, and its four business partners, claimed that it had submitted a mascot proposal and marketing plan to the team which was "strikingly similar" to that of Dinger.<sup>147</sup> Akmad's proposal, copyrighted in 1994, called for the Rockies to hatch a dinosaur mascot—"Colorado Rockiesaurus"—at the stadium after first announcing that a giant dinosaur egg had been found.<sup>148</sup> The team claimed it had reviewed the proposal but instead chose to develop its own plan.<sup>149</sup> After nine months of litigation, the parties reached a settlement on undisclosed terms in

142. See generally 17 U.S.C. §§ 101–1332 (2012 & Supp. II 2014).

143. See generally *id.* Revenue from licensing may encourage some shared use of mascot trademarks. See Kevin Wilson, *Use of Wildcat Logo Can Fall into Legal Gray Area*, CLOVIS NEWS J., (Apr. 23, 2011), <http://www.cnjonline.com/2011/04/23/use-of-wildcat-logo-can-fall-into-legal-gray-area> (describing use of Kansas State University wildcat logo in Clovis, N.M. Municipal School District).

144. See *Timeline*, MLB.COM: OFFICIAL SITE CO. ROCKIES, <http://colorado.rockies.mlb.com/col/history/timeline.jsp> (last visited Oct. 25, 2016); *A to Z Guide: Dinger*, MLB.COM: OFFICIAL SITE CO. ROCKIES, <http://colorado.rockies.mlb.com/col/ballpark/information/index.jsp?content=guide> (last visited Oct. 4, 2016).

145. See William Porter, *What to Make of Dinger, Our Prehistoric Purple Pal*, DENV. POST (Oct. 27, 2007, 12:06 PM), updated May 7, 2016, 7:08 PM), <http://www.denverpost.com/2007/10/27/what-to-make-of-dinger-our-prehistoric-purple-pal/>; see also *Cheap Seats*, SPOKESMAN-REV. (Jan. 11, 1996), <http://www.spokesman.com/stories/1996/jan/11/cheap-seats/>; *A to Z Guide: Dinger*, *supra* note 144.

146. See *AKMAD Co. v. Colo. Rockies Baseball Club*, No. 1:96-cv-00001 (D. Co. Nov. 1, 1996); see also *Which Came First—the Dinger or the Egg?*, SPORTS BUS. DAILY (Jan. 4, 1996), <http://www.sportsbusinessdaily.com/Daily/Issues/1996/01/4/Sponsorships-Advertising-Marketing/WHICH-CAME-FIRST-THE-DINGER-OR-THE-EGG.aspx?hl=Colorado%20Rockies&sc=0>.

147. *Cheap Seats*, *supra* note 145.

148. See *Which Came First—The Dinger or the Egg?*, *supra* note 146.

149. *Cheap Seats*, *supra* note 145.

October 1996.<sup>150</sup>

The Kansas City Royals faced a similar lawsuit in 2000, when former employee Michael Corbett sued the team in federal court for copyright infringement.<sup>151</sup> Corbett claimed that the team patterned its mascot—a “loveable lion” known as “Sluggerrr” who debuted in 1996<sup>152</sup>—after a character he devised and copyrighted known as “Leo the Royal Lion.”<sup>153</sup> The lawsuit alleged that the Royals incorporated the key elements of his design for Sluggerrr, including a light blue cape, a gold crown, and a distinctive facial impression.<sup>154</sup> Although the case settled on undisclosed terms,<sup>155</sup> Sluggerrr’s continued existence (as well as his future legal problems) indicates that the case was resolved in such a way that the Royals maintained rights in the mascot.

### B. Trademark Infringement

Trademark law protects words, names, symbols, and devices used to identify or distinguish goods or services.<sup>156</sup> In the modern age of marketing and branding, teams have trademarked not only mascots, but everything from stadium features (the “Green Monster Seats”<sup>157</sup>) to concessions (the “Dodger Dog”<sup>158</sup>).<sup>159</sup> At least three different types of trademark conflicts have arisen in the context of baseball mascots—conflicts involving two similar marks, opposition to trademark registrations, and the weakening of existing trademarks.

The first type of trademark dispute involves a conflict between the use of two existing marks. For example, in 1996, Georgia Institute of

Technology (“Georgia Tech”) learned that the logo of the Salt Lake Buzz (a minor league affiliate of the team then called the California Angels<sup>160</sup>) was somewhat similar to the logo of the college’s Yellow Jackets.<sup>161</sup> After the school notified the Buzz of its objection to the team’s name and logo, the team’s owner filed a declaratory judgment action, which was subsequently dismissed by both federal trial and appellate courts.<sup>162</sup> Georgia Tech then filed a trademark infringement action in 1998 to protect its registration of the word “Buzz” and its graphic design of a yellow jacket.<sup>163</sup>

Often, the primary issue in a trademark infringement claim is whether there is a “likelihood of confusion between the [two] marks”<sup>164</sup>; in this case, the question was whether it was likely that the two stinging insect-marks would be confused.<sup>165</sup> The court considered seven factors in turn—the two most important of which were the “type of mark” and “evidence of actual confusion.”<sup>166</sup> Although the marks appeared strong, their similarity was disputed, it was unclear whether the Buzz intended to confuse, and Georgia Tech presented no evidence of actual confusion.<sup>167</sup> As a result, after conducting the analysis, the court determined that summary judgment was inappropriate because issues of fact remained to be resolved.<sup>168</sup>

Rather than continuing with litigation, the parties eventually reached an out-of-court settlement.<sup>169</sup> In October 2001, the Salt Lake franchise—by then known as the Stingers<sup>170</sup>—agreed to pay Georgia Tech \$600,000, in exchange for the team ending its use of the name Buzz and

150. *Rockies, Partnership Settle over Dinger Idea*, DENV. POST, Oct. 19, 1996, at B3.

151. Mark Morris, *Copyright Case Names Sluggerrr*, KAN. CITY STAR, Feb. 22, 2000, at B1; Hruby, *supra* note 13; Complaint at 4, Corbett v. Kan. City Royals Baseball Corp., No. 4:00-CV-00173 (W.D. Mo. May 16, 2000).

152. *Sluggerrr’s Den*, MLB.COM: OFFICIAL SITE KAN. CITY ROYALS, [http://kansascity.royals.mlb.com/kc/fan\\_forum/sluggerrr\\_about.jsp](http://kansascity.royals.mlb.com/kc/fan_forum/sluggerrr_about.jsp) (last visited Oct. 4, 2016). See also *supra* Section II.B; *infra* Section III.B.

153. Morris, *supra* note 151; see also Hruby, *supra* note 13.

154. Morris, *supra* note 151; see also Hruby, *supra* note 13.

155. See Stipulated Motion for Dismissal, Corbett v. Kan. City Royals Baseball Corp., No. 4:00-CV-00173 (W.D. Mo. May 16, 2000).

156. 15 U.S.C. § 1127 (2012).

157. See generally Seth Berthiaume, *The View from the Monster Seats at Fenway*, ESPN: SWEETSPOT (June 7, 2011), [http://www.espn.com/blog/sweetspot/post/\\_id/12020/the-view-from-the-monster-seats-at-fenway](http://www.espn.com/blog/sweetspot/post/_id/12020/the-view-from-the-monster-seats-at-fenway).

158. See generally *Dodger Dogs Now Available Ready-to-Eat Outside of a Stadium*, ESPN (May 3, 2016), [http://www.espn.com/mlb/story/\\_id/15454690/get-her-dodger-dogs-snack-being-sold-ballpark](http://www.espn.com/mlb/story/_id/15454690/get-her-dodger-dogs-snack-being-sold-ballpark).

159. See *Trademark Electronic Search System (TESS)*, U.S. PAT. & TRADEMARK OFF., <http://tmsearch.uspto.gov/> (click hyperlink “Basic Word Mark Search” and insert “Green Monster Seats” and “Dodger Dog” into search term to view each trademark) (last visited Oct. 4, 2016).

160. See *infra* notes 300–01 and accompanying text.

161. Bd. of Regents of the Univ. Sys. of Ga. v. Buzas Baseball, Inc., 176 F. Supp. 2d 1338, 1344–46 (N.D. Ga. 2001).

162. *Id.* at 1346.

163. See *id.* at 1344–46.

164. See *id.* at 1350; see also 15 U.S.C. § 1051(a)(3)(D) (2012) (refusal of registration based on likelihood of confusion); *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361–62 (C.C.P.A. 1973) (discussing likelihood of confusion factors).

165. See Bd. of Regents, 176 F. Supp. 2d at 1351–52.

166. *Id.* at 1351.

167. See *id.* at 1350–54.

168. *Id.* at 1354.

169. See Thomas O’Toole, *Copyright Case over ‘Buzz’ Costly to Ga. Tech*, USA TODAY (Oct. 2, 2001), <http://usatoday30.usatoday.com/sports/college/2001-10-02-copyright-gatech.htm>.

170. *Id.* The franchise is now known as the Salt Lake Bees, with a bee mascot named “Bumble.” History, MILB.COM: OFFICIAL SITE SALT LAKE BEES, [http://www.milb.com/content/page.jsp?ymd=20090126&content\\_id=40997566&sid=t561&vkey=team1](http://www.milb.com/content/page.jsp?ymd=20090126&content_id=40997566&sid=t561&vkey=team1) (last visited Oct. 7, 2016); *Bumble*, MILB.COM: OFFICIAL SITE SALT LAKE BEES, [http://www.milb.com/content/page.jsp?ymd=20090126&content\\_id=40994922&sid=t561&vkey=team2](http://www.milb.com/content/page.jsp?ymd=20090126&content_id=40994922&sid=t561&vkey=team2) (last visited Oct. 7, 2016).

withdrawing its trademark application for "Buzzy" the mascot.<sup>171</sup>

A second type of trademark dispute has arisen during the trademark registration process, when one party opposes the granting of a trademark to another party. An example of this type of litigation has its beginning in 2001, when the Manchester Monarchs, a new minor league hockey team in Manchester, New Hampshire, began its first season with a lion mascot known as "Max."<sup>172</sup> When the team's owner filed a trademark registration for Max in 2003, it was opposed by the Kansas City Royals, claiming that it had priority to the mark and that a likelihood of confusion with its mascot, Sluggerrr, existed.<sup>173</sup>



Photo Credit: *Kan. City Royals Baseball Corp. v. Anschutz Manchester Hockey, LLC*, 2008 WL 5256409, at \*1, \*5 (T.T.A.B. 2008).

Because the Royals had for some reason failed to trademark Sluggerrr, an administrative trademark panel was forced to decide the dispute based on common law principles.<sup>174</sup> After examining all the relevant factors,<sup>175</sup> the panel had to decide whether the Monarchs' "use of its MAX mascot mark in connection with the goods and services identified in the application is likely to cause confusion vis-à-vis [the Royals'] prior common-law use of its SLUGGER mascot mark in

171. O'Toole, *supra* note 169; John M. Willis, *Salt Lake Stingers Stung for \$600,000*, ROME NEWS-TRIB. (Rome, Ga.), Oct. 3, 2001, at 5A.

172. See *Kan. City Royals Baseball Corp. v. Anschutz Manchester Hockey, LLC*, 2008 WL 5256409, at \*5 (T.T.A.B. 2008); see also *Max Request Form*, OFFICIAL WEBSITE MANCHESTER MONARCHS, <http://manchestermmonarchs.com/fan-zone/max/> (last visited Oct. 4, 2016).

173. See *Kan. City Royals Baseball Corp. v. Anschutz Manchester Hockey, LLC*, 2008 WL 5256409, at \*1 (T.T.A.B. 2008).

174. *Id.* at \*2; see also *supra* note 164 and accompanying text.

175. See *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361–62 (C.C.P.A. 1973) (listing thirteen factors to be considered, including similarity of marks, similarity of goods and services, and extent of potential confusion).

connection with [the Royals'] goods and services."<sup>176</sup>

Several factors weighed in favor of confusion. For example, "Sluggerrr and Max both are professional sports team mascots, who serve the same purposes and engage in the same types of mascot-related activities for their respective teams."<sup>177</sup> The marks were used in connection with similar goods and services (sports entertainment) and purchased by similar consumers (sports fans).<sup>178</sup>

However, the most important factor in the court's analysis was the extent of similarity between the two marks. Because each mascot was only significant as a representative of its team, the Court determined that the dominant feature of the mark was the jersey worn by each lion.<sup>179</sup> While the appearance of the marks was similar (both lion sport team mascots) the visual similarity was outweighed by the different jerseys—and thus the different teams each lion represents.<sup>180</sup>

As a result, the panel found that the two marks were not likely to cause confusion:

Even if the parties' mascot-related goods and services, trade channels and purchasers might be found to overlap (because the parties both are engaged generally in the sports entertainment business), we find that relevant consumers are likely to understand that Max and Sluggerrr are two different mascots for two different teams.<sup>181</sup>

Both Max and Sluggerrr represent their respective teams today.

In another recent example, Creighton University applied for a trademark to protect a new logo for its athletics teams, nicknamed the Blue Jays.<sup>182</sup> During the registration process, the Toronto Blue Jays franchise filed a Notice of Opposition, alleging that it would be damaged if Creighton's blue jay bird head mark were registered.<sup>183</sup> The team argued that the Creighton mark, particularly in connection with the words Blue Jays, would confuse the public and suggest a false

176. *Kan. City Royals Baseball Corp. v. Anschutz Manchester Hockey, LLC*, 2008 WL 5256409, at \*7 (T.T.A.B. 2008).

177. *Id.* at \*11.

178. *Id.* at \*8–9.

179. *Id.* at \*14.

180. *Id.* at \*16.

181. *Id.* at \*18.

182. See Notice of Opposition at 4, *Rogers Blue Jays Baseball P'ship v. Creighton Univ.*, Opposition No. 91217791 (T.T.A.B. filed Aug. 11, 2014), <http://ttabvue.uspto.gov/ttabvue/v?pno=91217791&pty=OPP&eno=1> (Creighton filed "Application" on September 18, 2013) (last visited Oct. 7, 2016).

183. Notice of Opposition, *supra* note 182, at 5–6.

connection between the university and the team.<sup>184</sup> As of 2016, settlement negotiations are ongoing.<sup>185</sup>

The third type of trademark-related mascot dispute involves actions taken by a party which weaken existing trademarks owned by the team.<sup>186</sup> In 2007, Chicago Cubs fan John Paul Weier bought a bear costume and attempted to enter Wrigley Field to entertain fans, hoping to persuade the franchise to make him the team mascot.<sup>187</sup> Denied entrance to the stadium, "Billy Cub" began taking pictures with fans outside the stadium as the team's "unofficial mascot."<sup>188</sup> Citing trademark infringement, fan complaints, and consumer confusion, the Cubs eventually sent Weier a 100 page cease and desist letter.<sup>189</sup> Weier ignored the letter and a proposed settlement of \$15,000 and continued to walk the streets of Wrigleyville for seven years before home games.<sup>190</sup>

In 2014, however, the Cubs finally had had enough of Billy. After the introduction of the team's official mascot "Clark,"<sup>191</sup> as well as a videotaped incident in which Billy Cub attacked a man in a Chicago bar,<sup>192</sup> the team finally brought suit in federal court.<sup>193</sup> In the suit, the team charged that Weier and his associates had demanded tips, made profane gestures, and profited from the team's protected marks.<sup>194</sup> All of these actions, the Cubs charged, had tarnished, diluted, and weakened the

184. Notice of Opposition, *supra* note 182, at 5.

185. See Motion on Consent to Suspend the Proceeding and to Extend Discovery Period if Opposition is Resumed at 1-2, Rogers Blue Jays Baseball P'hip v. Creighton Univ., Opposition No. 91217791 (T.T.A.B. filed Aug. 3, 2016), <http://ttabvue.uspto.gov/ttabvue/v?ptno=91217791&pty=OPP&eno=25> (last visited Oct. 7, 2016).

186. See 15 U.S.C. § 1125(c) (2012) (owner of famous mark entitled to protection from uses of other mark which is likely to cause blurring or dilution of famous mark).

187. See Phil Rogers, "Billy Cub" Disappointed by Cubs Mascot Snub, NBC CHI. 5 (Jan. 13, 2014, 7:17 PM updated 10:48 PM), <http://www.nbcchicago.com/news/local/Billy-Cub-Disappointed-by-Cubs-Mascot-Snub-240020121.html>.

188. See *id.*

189. See *id.*

190. See *id.* Not every alleged mascot infringer is as willing to defy the franchise. See, e.g., Dan Geringer, *Phlyin' Flugtag Team Just Can't Get a Head*, PHILA. DAILY NEWS, Sept. 3, 2010, at 7 (describing how threatened trademark violations prompted builders of a homemade aircraft replica of the Phillie Phanatic to remove the mascot's head before a flying contest).

191. See, e.g., Borelli, *supra* note 18; Paul Sullivan, *Battle of the Cubs Mascots Goes on Mostly Silent*, CHI. TRIB. (Apr. 8, 2014), [http://articles.chicagotribune.com/2014-04-08/sports/ct-battling-mascot-sullivan-cubs-spt-0409-20140409\\_1\\_cubs-rickettses-mascot](http://articles.chicagotribune.com/2014-04-08/sports/ct-battling-mascot-sullivan-cubs-spt-0409-20140409_1_cubs-rickettses-mascot).

192. See, e.g., *Cubs Sue over Fake Mascot*, ESPN (July 19, 2014), [http://www.espn.com/chicago/mlb/story/\\_id/11236721/chicago-cubs-sue-fake-mascot-got-bar-fight](http://www.espn.com/chicago/mlb/story/_id/11236721/chicago-cubs-sue-fake-mascot-got-bar-fight). See also ruppie213, *Mascot Punches Guy at Wrigleyville Bar.*, YOUTUBE (Apr. 5, 2014), <https://youtu.be/lzPVqT5vW4M> (showing video of incident).

193. E.g., *Cubs Sue Over Fake Mascot*, *supra* note 192; Complaint, Chi. Cubs Baseball Club, LLC v. Weier, No. 1:14-CV-5507 (N.D. Ill. Sept. 29, 2014), 2014 WL 4682467.

194. See Complaint, *supra* note 193, at 4-10.

intellectual property owned by the team.<sup>195</sup>

In September 2014, the case was settled with an Agreed Permanent Injunction.<sup>196</sup> The Weiers were required to cease and desist all Billy Cub activities, refrain from any acts suggesting an affiliation with the Cubs, and deliver the bear costumes to the Cubs for destruction.<sup>197</sup>

### C. Fair Use

One of the most important defenses to trademark or copyright infringement is the doctrine of fair use, which permits certain limited use of protected intellectual property.<sup>198</sup> The most important fair use case involving baseball mascots had its origins in 1992, when PBS began airing its popular children's television series "Barney and Friends," starring a purple Tyrannosaurus Rex.<sup>199</sup> Barney's "awkward and lovable behavior, good-natured disposition, and renditions of songs like 'I love you, you love me,' . . . warmed the hearts and captured the imaginations of children across the United States."<sup>200</sup>

As Barney's popularity increased, "the [Famous San Diego] Chicken's beady glare came to rest on that lovable and carefree icon of childhood."<sup>201</sup> The Chicken soon developed an on-the-field act in which he performed with—and assaulted—a Barney look-a-like.<sup>202</sup> Lyons

195. See Justin Fielkow, *Mascot Wars: Cubs Resolve Trademark Dispute with 'Billy Cub' Foil*, SPORTS ESQUIRES (Nov. 3, 2014), <http://thesportsesquires.com/mascot-wars-cubs-resolve-trademark-dispute-with-billy-cub-foil/>.

196. Agreed Permanent Injunction, Chi. Cubs Baseball Club, LLC v. Weier, No. 1:14-CV-5507 (N.D. Ill. Sept. 29, 2014).

197. Agreed Permanent Injunction, *supra* note 196, at 1-2; Al Yellon, *Cubs, 'Billy Cub' Reach Federal Court Settlement*, SB NATION: BLEED CUBBIE BLUE (Oct. 29, 2014, 4:15 PM), <http://www.bleedcubbieblue.com/2014/10/29/7097821/cubs-billy-cub-federal-court-settlement>.

198. See 17 U.S.C. § 107 (2012).

199. See Lyons P'ship v. Giannoulas (*Lyons II*), 179 F.3d 384 (5th Cir. 1999); *Barney & Friends: Company Credits*, IMDB, [http://www.imdb.com/title/tt0144701/companycredits?ref\\_=ttrel\\_sa\\_4](http://www.imdb.com/title/tt0144701/companycredits?ref_=ttrel_sa_4) (last visited Oct. 7, 2016).

200. *Id.* at 385. See also Lyons P'ship v. Giannoulas (*Lyons I*), 14 F. Supp. 2d 947, 950 (N.D. Tex. 1998) ("Barney is a positive, wholesome character who encourages children to use their imaginations and to solve problems. He is a wise, yet innocent, friend who provides a secure, friendly, loving feeling for preschool children and who consistently demonstrates the values of love, basic trust, and civility."), *aff'd*, 179 F.3d 384 (5th Cir. 1999).

201. *Lyons II*, 179 F.3d at 386.

202. *Id.* at 387 ("The sketch would begin with the Chicken disco dancing. The Barney character would join the Chicken on the field and dance too, but in an ungainly manner that mimicked the real Barney's dance. The Chicken would then indicate that Barney should try to follow the Chicken's dance steps (albeit, by slapping the bewildered dinosaur across the face). At this point, Barney would break character and out-dance the Chicken, to the crowd's surprise. The Chicken would then resort to violence, tackling Barney and generally assaulting Barney. Barney would ultimately submit to the Chicken and they would walk off the field apparently friends, only for the Chicken to play one last gag on the back-in-character naive and trusting Barney. The Chicken would flip Barney over a nearby obstacle, such as a railing."). See also *iowacubbies*,



Partnership LP, which owned the rights to Barney, filed suit against performer Ted Giannoulas and the Chicken for trademark infringement and other claims, primarily based on consumer confusion.<sup>203</sup>



Photo Credit: <http://www.famouschicken.com/photogallery.html>

Based on the fair use doctrine, the federal trial court granted summary judgment for Giannoulas.<sup>204</sup> The federal trial court made three key findings: 1) the act was a new work commenting on Barney's character; 2) a minimal amount of the original Barney was used; and 3) the Chicken's act posed minimal threat to Barney's market, revenues, or derivative works.<sup>205</sup>

The primary issue on appeal was whether Giannoulas was parodying Barney—protected by the fair use doctrine—or infringing on Lyons' trademark.<sup>206</sup> Giannoulas argued that his use of the character was as minimal as possible—although his character looked like Barney, he did not speak like Barney, perform Barney's songs, or interact with Barney's friends.<sup>207</sup> The court agreed.<sup>208</sup> The Chicken was not trying to benefit from Barney's goodwill (in fact, he antagonized the character), and the act was not designed to appeal to the preschool-aged children who comprised Barney's audience.<sup>209</sup> As a result, the court permitted the Chicken's act with a Barney-like character to continue as a fair use

*Famous Chicken Dances with Barney*, YOUTUBE (June 19, 2008), <http://youtu.be/SUmgRjgeRpM> (showing act).

203. See *Lyons II*, 179 F.3d at 385–88. Trial court testimony included stories of children who believed the real Barney was being assaulted. See *id.* at 386 (describing a two-year-old who was inconsolable for several days, repeating the phrase “[c]hicken step on Barney”).

204. *Lyons I*, 14 F. Supp. 2d at 949, 954–56.

205. See *id.* at 955.

206. See *Lyons II*, 179 F.3d at 387–88.

207. *Id.* at 388.

208. *Id.*

209. See *id.*

parody.<sup>210</sup>

#### IV. MASCOTS AND EMPLOYMENT LAW

Because mascots are typically employed by the franchise, traditional employer-employee relationships and general principles of employment law apply. This means, for example, that a team can be held responsible for a mascot performer's actions within the scope of his employment.<sup>211</sup> In addition, however, this status means that a performer is usually party to a written employment contract, which may contain provisions governing not only salary, but morals, termination of employment, restrictions on appearances at non-baseball venues, protection of trademarks, liquidated damages, and restrictions on future employment (or covenants not to compete).

One of the most significant employee contractual provisions is a covenant not to compete, which admittedly restrains trade. Upon leaving a position, employees may be barred from working for a competitor. Likewise, those competitors may be hampered or enjoined from recruiting qualified workers from other competitors. But despite the impact upon free trade and the mobility of workers, covenants not to compete may be valid and enforceable if the restraint passes a three part test: (1) Does the contractual provision protect valuable information or property of the employer? (2) Is the provision reasonable in duration? (3) Is the provision reasonable in geographic scope?<sup>212</sup> For example, a provision that bars a former employee from contacting customers of the employer for six months in the same county is likely to be valid. But a provision limiting a former employer from obtaining new customers for three years in a broad geographic area is much more suspect. Although baseball mascots may not qualify as valuable information, they certainly do represent valuable property to the franchise and thus could potentially be restrained if the restraint passes a test of reasonableness.

The primary case involving the employment of mascots involves just such a non-compete covenant designed to restrict the “father of modern sports entertainment” and the “best-known, highest-paid baseball mascot

210. See *id.* at 388, 390.

211. See *supra* Section II.B.

212. See, e.g., HOWARD W. BRILL & CHRISTIAN H. BRILL, *ARKANSAS LAW OF DAMAGES* § 19:3 (6th ed. 2014 & Supp. 2015); see also *Idbeis v. Wichita Surgical Specialists, P.A.*, 112 P.3d 81, 87 (Kan. 2005) (quoting *Weber v. Tillman*, 913 P.2d 84, 90 (Kan. 1996)) (examining employer's business interest, employee's burden, covenant's impact on public welfare, and reasonableness of time and geographic restrictions).



in history"—Ted Giannoulas.<sup>213</sup> As a San Diego college student in 1974, Giannoulas was hired by a local radio station, KGB-FM ("KGB"), to wear a chicken suit emblazoned with the station's logo and hand out Easter eggs at the San Diego Zoo for one week.<sup>214</sup> After his stint was completed, Giannoulas volunteered to appear at the San Diego Padres' opening day game, primarily so he could attend the game for free.<sup>215</sup> His appearance was such a success that he appeared on behalf of the station for five years—both at the stadium and at community events—and became known as the Famous San Diego Chicken.<sup>216</sup>

Unfortunately, in May 1979, KGB fired Giannoulas, and then the station sued him for \$250,000 in damages based on contract violations and unauthorized appearances.<sup>217</sup> A trial court granted the station an injunction, preventing Giannoulas from appearing in the KGB chicken costume—or a "substantially similar" costume—in San Diego or surrounding counties.<sup>218</sup> But the Chicken would not disappear for long. On June 29, 1979, in what came to be known as the "Grand Hatching," a sellout crowd at Jack Murphy Stadium gave Giannoulas a standing ovation as he burst from a giant egg at home plate wearing a new chicken costume.<sup>219</sup>

KGB was not amused. As the lawsuit continued, the station argued the new costume was prohibited by the trial court's injunction, because the public would be confused and assume Giannoulas still represented the station.<sup>220</sup> The case centered on the interpretation of the contract between KGB and Giannoulas—primarily whether Giannoulas was violating a non-competition clause and whether the station owned rights to the character.<sup>221</sup>

In his contract, Giannoulas had agreed to an explicit non-competition

213. Bill Plaschke, *Fowled Away*, L.A. TIMES (Aug. 25, 2002), <http://articles.latimes.com/2002/aug/25/sports/sp-plaschke25>.

214. THE FAMOUS SD CHICKEN, *supra* note 15.

215. Lou Olsen, *Talkin' Baseball with the San Diego Chicken—Part One*, SPORTS DAILY: HALL OF VERY GOOD (July 23, 2014, 10:39 PM), <http://hallofverygood.com/2014-articles/talkin-baseball-with-the-san-diego-chicken-part-one.html>.

216. *See id.* *See also* Patricia Lee Murphy, *Looking for Some Chicken Delight? Just Order up Ted Giannoulas, Who's Sure Not to Lay an Egg*, PEOPLE (Sept. 25, 1978), <http://www.people.com/people/archive/article/0,,20071802,00.html>.

217. *See* 'Old Fuddy-Duddy' Judge Defrocks KGB Chicken, SANTA CRUZ SENTINEL, May 30, 1979, at 26.

218. *Id.* *See also* KGB, Inc. v. Giannoulas, 164 Cal. Rptr. 571, 576 (Cal. Ct. App. 1980) (discussing the injunction granted by the trial court).

219. *See* Olsen, *supra* note 215; thefamouschicken, *The Grand Hatching*, YOUTUBE (Feb. 17, 2011), <https://www.youtube.com/watch?v=IVrDjDyHJwY>.

220. *See* KGB, Inc., 164 Cal. Rptr. at 576.

221. *See id.* at 580–84.

clause: "For a period of five years after termination of this agreement, employee agrees not to act as a mascot of any radio station other than KGB, Inc., in the San Diego market."<sup>222</sup> Leaving aside questions of whether the restraint itself was reasonable, the court found that this clause only restricted his performance as a KGB mascot—it did not prevent him from performing in other chicken costumes.<sup>223</sup> "We think, however, Giannoulas' performances in a chicken costume are neither competitive nor unfair because he does not sport the KGB logos or otherwise imply he represents KGB."<sup>224</sup>

Likewise, if KGB owned the rights to the character, Giannoulas would also be prevented from performing. Giannoulas had acknowledged that the "costume, concept, and the KGB Chicken" were the property of the station and that he would not obtain any interest in the chicken.<sup>225</sup> However, these contractual clauses only supported KGB's rights in the specific KGB Chicken; they did not "create a contractual monopoly of all appearances by Giannoulas in any chicken costume."<sup>226</sup> Even if both the employer and actor created a fictional role, in the absence of a contract granting the employer post-employment rights in and control of the character, such a restraint on use is discouraged by public policy.<sup>227</sup> Unlike trade secrets, which can be validly controlled by the employer after the employment relationship ends, Giannoulas' contributions to the Chicken were integral.<sup>228</sup> The Chicken's act was "created spontaneously through gestures, movements and responses to changing situations. KGB cannot be said to own such a routine."<sup>229</sup>

As a result of this analysis, the California Fourth District Court of Appeal disagreed with the trial court, overturning the injunction because it restricted Giannoulas' right to earn a living and use his talents as an artist.<sup>230</sup> More than 40 years after the character's creation, Giannoulas is still performing as the Chicken.<sup>231</sup>

In addition to non-competition clauses, other traditional employment contractual issues also apply to mascot employees. At the end of the

222. *See id.* at 580.

223. *Id.*

224. *Id.* at 578.

225. *See id.* at 580.

226. *Id.*

227. *See id.* at 577–84 (discussing rights in Dracula, Dr. Seuss, and other fictional characters).

228. *See id.* at 579–81.

229. *Id.* at 579.

230. *See id.* at 585–86.

231. *See* THE FAMOUS SD CHICKEN, *supra* note 15. *See also* Plaschke, *supra* note 213 (describing general declining interest in the act).

2002 season, John Routh,<sup>232</sup> who played Billy the Marlin, was let go from his job by the Florida Marlins.<sup>233</sup> At the time, Routh, who made \$80,000 annually, had been the only mascot performer in the team's history.<sup>234</sup> Routh hired an attorney and threatened to sue because he was not given a severance package; but it is unclear whether or not legal action was ever brought.<sup>235</sup>

State and federal law regulates employee work hours, which have also been at issue in baseball mascot litigation. In 2011, the recently-fired performer of "Champ," the mascot for the minor league Scranton/Wilkes-Barre Yankees, sued the franchise in federal court for alleged violations of Pennsylvania minimum wage laws and the federal Fair Labor Standards Act.<sup>236</sup> Brian Bonner claimed the team classified him as a "Marketing and Community Relations Manager" (ignoring his low salary and lack of supervisees) to avoid federal and state overtime laws governing exempt and nonexempt employees.<sup>237</sup> The case was quickly settled,<sup>238</sup> and Bonner is apparently still employed by the team, with the same title.<sup>239</sup>

Finally, employee policies have also been implicated by mascots—in particular policies involving social media. This case arose in Pittsburgh, where the Pirates' Pierogy Race features five costumed pierogies who race around the warning track at PNC Park during the middle of the fifth inning.<sup>240</sup>

232. Routh was performing as Billy when fan Saul Shechter was injured by a shot from a t-shirt gun. See *supra* notes 84–89 and accompanying text. While performing as the University of Miami's Sebastian the Ibis, Routh was involved in other newsworthy events. See Laken Litman, *24 Years Ago the Miami Hurricanes Mascot Was Detained Before the Florida State Game*, USA TODAY SPORTS: FORTHEWIN (Oct. 31, 2013, 10:07 AM), <http://ftw.usatoday.com/2013/10/24-years-ago-the-miami-hurricanes-mascot-was-detained-before-the-florida-state-game> (describing how Routh was prevented from entering field by police); *College Football Spotlight / The Bowl Games: That's School Spirit*, L.A. TIMES (Jan. 2, 1993), [http://articles.latimes.com/1993-01-02/sports/sp-2508\\_1\\_bowl-games-college](http://articles.latimes.com/1993-01-02/sports/sp-2508_1_bowl-games-college) (describing how Routh was hit by stray bullet).

233. See ESPN.com News Servs., *Mascot 'Original' Gets a Little Help from Friends*, ESPN (Nov. 2, 2002), <http://a.espncdn.com/mlb/news/2002/1102/1454788.html>.

234. *Id.*

235. See *id.*

236. Joe McDonald, *Ex-Yanks Mascot Takes Team to Court*, CITIZENS' VOICE (Feb. 3, 2011), <http://citizensvoice.com/news/ex-yanks-mascot-takes-team-to-court-1.1099196>.

237. *Id.*

238. See Order of Dismissal at 1, *Bonner v. SWB Yankees, LLC*, No. 3:11cv234 (M.D. Pa. May 21, 2011), 2011 WL 13119398.

239. Brian Bonner, *MILB.COM: OFFICIAL SITE SCRANTON/WILKES-BARRE RAILRIDERS*, [http://www.milb.com/content/page.jsp?sid=t531&ynd=20090911&content\\_id=6904946&vkey=tea](http://www.milb.com/content/page.jsp?sid=t531&ynd=20090911&content_id=6904946&vkey=tea) m2 (last visited Oct. 1, 2016).

240. See *The Pirates Pierogies*, *MILB.COM: OFFICIAL SITE PITT. PIRATES*, [http://pittsburgh.pirates.mlb.com/pit/fan\\_forum/pierogy\\_index.jsp](http://pittsburgh.pirates.mlb.com/pit/fan_forum/pierogy_index.jsp) (last visited Oct. 1, 2016) (describing race between Cheese Chester, Sauerkraut Saul, Oliver Onion, Jalapeno Hannah, and Bacon Burt). The race is modeled after the similar Sausage Race in Milwaukee. See Dan Majors,

In 2009, lifelong Pirates fan Andrew Kurtz was hired as an occasional pierogy mascot at a salary of \$25 per race.<sup>241</sup> Frustrated with the team's performance during the 2010 season,<sup>242</sup> Kurtz logged onto his personal Facebook page one afternoon, where he commented that "[Pirates Team President Frank] Coonelly extended the contracts of [Manager John] Russell and [General Manager Neal] Huntington through the 2011 season. That means a 19-straight losing streak. Way to go Pirates."<sup>243</sup> After learning of this post, team management immediately fired Kurtz for violating company policy.<sup>244</sup> Perhaps in fear of litigation, the Pirates reinstated Kurtz within a week, saying he had not been dismissed in accordance with company policy.<sup>245</sup> Whether or not Kurtz did in fact violate an established company social media policy, his complaints would most likely be considered unprotected under the National Labor Relations Act.<sup>246</sup>

## V. MASCOTS AND CRIMINAL LAW

Like the rest of society, mascots—or more accurately, mascot performers—have also become involved in a variety of criminal matters relating to their conduct. Because criminal actions are not within the scope of a performer's employment, the franchise is typically not implicated; however, teams may and often do take disciplinary action against the performer, such as suspension or termination of employment.

Probably the most notable criminal case is the sad story of Pittsburgh's "Pirate Parrot" and its involvement in baseball's cocaine epidemic of the 1980s. Pittsburgh introduced the Pirate Parrot in 1979, only one year after the cross-state rival Phillie Phanatic made his first

*Out at the Plate: Pirates Dump Outspoken Pierogi*, PITT. POST-GAZETTE (June 19, 2010, 4:15 AM), <http://www.post-gazette.com/sports/pirates/2010/06/19/Out-at-the-plate-Pirates-dump-outspoken-pierogi/stories/201006190175>.

241. See Majors, *supra* note 240.

242. Kurtz had good reason to be frustrated. The Pirates would finish the season with a record of 57-105, the franchise's worst record since 1952 and the eighteenth of its record twenty consecutive losing seasons. See *Pittsburgh Pirates Team History & Encyclopedia*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/teams/PIT/> (last visited Oct. 1, 2016).

243. See Majors, *supra* note 240.

244. See *id.*

245. See *Pirates Pierogi Racer Rehired*, ESPN (June 23, 2010), <http://sports.espn.go.com/mlb/news/story?id=5318009>.

246. See *The NLRB and Social Media*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Oct. 1, 2016) (describing how the National Labor Relations Board generally considers employee social media comments unprotected unless related to employee group activity).

appearance.<sup>247</sup> Its first performer was Kevin Koch, a lifelong Pirates fan, military veteran, and welder.<sup>248</sup> Koch quickly became accepted by the team and regularly spent time in the clubhouse as the team won the World Series crown.<sup>249</sup>

This success did not last long. Koch became aware of amphetamine use by players throughout the clubhouse.<sup>250</sup> He soon invited his high school friend Dale Shiffman to the stadium before games to meet players and even take the field during batting practice.<sup>251</sup> Shiffman obtained cocaine from local dealers and gradually, players began to ask Koch if he could obtain cocaine from Shiffman.<sup>252</sup> On the way to the stadium, Koch would pick up the cocaine and then deliver it to players, often outside the clubhouse or in the stadium parking lot.<sup>253</sup>

Eventually, federal agents learned that the Pirates mascot was facilitating drug transactions for the team's players.<sup>254</sup> In November 1984, Koch agreed to wear a wire and tape his friend Shiffman in exchange for immunity.<sup>255</sup> As word came out of the indictments, Koch was fired from his job as mascot.<sup>256</sup> Shiffman and six other men would be prosecuted at the resulting trials in September 1985, and eleven players (including stars Keith Hernandez and Dave Parker) were eventually suspended for their involvement.<sup>257</sup>

Some criminal charges involving mascots are far less connected to a team's players but may still occur on team property or while a mascot is working. For example, the performer inside "Reedy Rip'It", the giant frog mascot for the minor league Greenville Drive, was arrested on a misdemeanor charge of molestation in 2006 after groping a woman in a stadium stairwell while in costume.<sup>258</sup> Cecil Amick at first claimed

247. See *The Pirate Parrot*, MLB.COM: OFFICIAL SITE PITT. PIRATES, [http://pittsburgh.pirates.mlb.com/pit/fan\\_forum/mascot\\_index.jsp](http://pittsburgh.pirates.mlb.com/pit/fan_forum/mascot_index.jsp) (last visited Oct. 9, 2016); Crouch, *supra* note 16; *The Phanatic's Profile*, *supra* note 16.

248. See AARON SKIRBOLL, *THE PITTSBURGH COCAINE SEVEN: HOW A RAGTAG GROUP OF FANS TOOK THE FALL FOR MAJOR LEAGUE BASEBALL* 7-10 (2010).

249. *Id.* at 13, 21-25.

250. *Id.* at 36.

251. *Id.* at 57-58.

252. *Id.* at 58-61.

253. *Id.*

254. *Id.* at 119.

255. *Id.* at 120-21.

256. *Id.* at 155; MASS, *supra* note 13, at 165.

257. See *Pittsburgh Cocaine Trial: Baseball's 2nd Biggest Scandal: One Year Later*, L.A. TIMES (Sept. 21, 1986), [http://articles.latimes.com/1986-09-21/sports/sp-9304\\_1\\_pittsburgh-cocaine-trial](http://articles.latimes.com/1986-09-21/sports/sp-9304_1_pittsburgh-cocaine-trial); see also MASS, *supra* note 13, at 164-65.

258. See Clarissa Striker, *Team Mascot Arrested for Molestation*, CBS NEWS (July 7, 2006, 2:41 PM), <http://www.cbsnews.com/news/team-mascot-arrested-for-molestation/>.

innocence<sup>259</sup> but later pled guilty to a reduced charge of disorderly conduct.<sup>260</sup> The team was not implicated in the incident even though it occurred at the stadium, likely because the actions were not within the scope of Amick's employment.

Criminal charges often are brought against mascot performers, like other employees, for conduct that is more tangentially related to their employment. In 2007, the mascot performer for the minor league Scranton/Wilkes-Barre Yankees was arrested on a variety of sexual molestation charges, after apparently using the team van to entice victims.<sup>261</sup> A backup performer for the Phillie Phanatic crashed and flipped a "Phanatic Bandwagon" van decorated with artwork of the Phanatic; he was charged with drunken driving after fleeing the scene and leaving the Phanatic costume inside.<sup>262</sup> The mascot performer for the Arizona Diamondbacks lost his job after being arrested in 2008 on a DUI charge while driving a vehicle with a team logo and with the mascot costume inside.<sup>263</sup> While these deeds may not necessarily be imputable to the team, the franchise (like any business) is certainly cast in a negative light when its employees commit criminal acts.

Even mascot property has been the subject of criminal theft. In 2004, the Phillie Phanatic's head was stolen from a first aid room during a charity auction.<sup>264</sup> Bernard Bechtel entered the room by a back door, concealed the Phanatic's head under his ski jacket, and left the building.<sup>265</sup> After eleven days, he returned the head to receive a reward; instead, he was apprehended and, "charged with receiving stolen

259. *Lawyer for Greenville Mascot Says Client's Innocent of Molestation Charges*, WISTV.COM (July 14, 2006), <http://www.wistv.com/story/5150148/lawyer-for-greenville-mascot-says-clients-innocent-of-molestation-charges>.

260. *Former Baseball Mascot Pleads Guilty to Disorderly Conduct*, WISTV.COM (Oct. 27, 2006), <http://www.wistv.com/story/5601194/former-baseball-mascot-pleads-guilty-to-disorderly-conduct>. To view docket of *City of Greenville v. Amick*, No. 71903DL (S.C. 13th Jud. Cir. 2006), see *Greenville County 13th Judicial Circuit Public Index*, GREENVILLE CTY., <http://www.greenvillecounty.org/scjd/publicindex/CaseDetails.aspx?County=23&CourtAgency=23206&Casenum=71903DL&CaseType=C> (accept disclaimer; search by "71903DL" in "Case #"; follow "71903DL" hyperlink; follow "Charges" hyperlink) (last visited Nov. 5, 2016).

261. See Edward Lewis, *Mascot Arrested on Sex Charges*, TIMES-LEADER (Wilkes-Barre, Pa.), Apr. 4, 2007, at 3A.

262. Richard V. Sabatini, *Backup Phanatic Charged a Substitute Mascot for the Phillies Faces Drunken-Driving Charges in an Accident in Bucks.*, PHILA. INQUIRER, Nov. 21, 1997, at B04.

263. See Nick Piccoro, *D-Backs Fire D. Baxter After DUI Arrest*, AZCENTRAL.COM (Jan. 20, 2009, 2:05 PM), <http://www.azcentral.com/sports/diamondbacks/articles/2009/01/20/20090120spt-dbbaxter.html>.

264. See Kathleen Parrish, *Tip, Miscues Led to Return of Phanatic's Stolen Head*, MORNING CALL (Feb. 19, 2004), [http://articles.mcall.com/2004-02-19/news/3522893\\_1\\_radio-station-phillie-phanatic-tommy-conwell](http://articles.mcall.com/2004-02-19/news/3522893_1_radio-station-phillie-phanatic-tommy-conwell).

265. *Id.*

property, burglary, theft and trespassing.”<sup>266</sup> Bechtel later received probation.<sup>267</sup>

Another incident of theft occurred in 2015 when Joe Gillespie attended a beer festival held in Charlotte’s BB&T Ballpark, home of the Charlotte Knights.<sup>268</sup> After apparently passing out at the bottom of a stadium stairwell, Gillespie awoke several hours later to find the costume for “Homer the Dragon” nearby.<sup>269</sup> He quickly donned the dragon costume and left the empty stadium to enjoy a night out in downtown Charlotte, including dances at local bars and rides on a bicycle rickshaw.<sup>270</sup> Gillespie was quickly located and charged with larceny and breaking and entering.<sup>271</sup>

Finally, although he escaped criminal charges in the end, a mascot hopeful was threatened with trespassing violations at Dodger Stadium in 2013 resulting from his quest to promote a Dodger mascot.<sup>272</sup> During the eighth inning of a National League Championship Series game between the Dodgers and Cardinals, fifty-year old furniture store owner Mark Monninger donned a bear head and jumped onto the visitor’s dugout, waving his arms and doing the splits.<sup>273</sup> “Rally Bear” briefly entertained the crowd (including actor Dustin Hoffman)<sup>274</sup> before being accosted by

266. *Id.*

267. Jacqueline Soteropoulos, *Probation Set in Phanatic Theft*, PHILA. INQUIRER, May 22, 2004, at B05 (defendant placed on two-year probation and “ordered to perform 100 hours of community service” after waiving preliminary hearing on three felony charges).

268. See *Man Steals ‘Homer the Dragon’ Costume from Uptown Ballpark, Officials Say*, WBTV.COM (Sept. 21, 2015, 10:00 AM, updated Sept. 22, 2015, 5:26 PM), <http://www.wbtv.com/story/30078937/man-steals-homer-the-dragon-costume-from-uptown-ballpark-officials-say>.

269. Ryan Pitkin, *Homer’s Night on the Town*, CREATIVE LOAFING CHARLOTTE (Sept. 30, 2015), <http://clclt.com/charlotte/homers-night-on-the-town/Content?oid=3682852>.

270. *Id.*

271. See *id.* Gillespie planned to deny the charges. See *id.* (“Man, how did I break in when I was already in there? It wasn’t breaking and entering, it was opening and exiting. . . . Professionals steal, amateurs borrow. I’m just an amateur.”).

272. See Ari Bloomekatz, *‘Rally Bear’ Banned from Dodger Stadium for Six Months After Stunt*, L.A. TIMES (Oct. 15, 2013), <http://articles.latimes.com/2013/oct/15/local/la-me-ln-rally-bear-banned-from-dodger-stadium-for-six-months-20131015>; Gene Maddaus, *Mark Monninger, Dodgers Rally Bear, Is an Ex-Minor League Mascot Looking for One Last Shot at Glory*, L.A. WKLY. (Oct. 15, 2013, 11:56 AM), <http://www.laweekly.com/informer/2013/10/15/mark-monninger-dodgers-rally-bear-is-an-ex-minor-league-mascot-looking-for-one-last-shot-at-glory>; see also Clay Fowler & Monica Rodriguez, *Rancho Cucamonga Man Was Inside the Bear Suit at Monday’s Dodger Game*, DAILY BULL. (Oct. 15, 2013, 6:29 PM), <http://www.dailybulletin.com/lifestyle/20131015/rancho-cucamonga-man-was-inside-the-bear-suit-at-mondays-dodger-game>. The next year, the Dodgers debuted a mascot of sorts. See Dilbeck, *supra* note 18.

273. Maddaus, *supra* note 272; Bloomekatz, *supra* note 272.

274. See Barry Petchesky, *The Ballad of the Fake Dodgers Bear Mascot*, DEADSPIN (Oct. 15, 2013, 8:45 AM), <http://deadspin.com/the-ballad-of-the-fake-dodgers-bear-mascot-1445518275>.

security.<sup>275</sup> In lieu of trespassing charges, Monninger was escorted from the stadium and agreed to stay away from Dodger Stadium for six months.<sup>276</sup> In fact, this was not Monninger’s first brush with the law as a mascot—in a strange twist of fate, Monninger’s performance as Tremor the dinosaur gave rise to the seminal mascot distraction case almost twenty years earlier.<sup>277</sup>

## VI. MASCOTS AND OTHER AREAS OF LAW

It is not only on-the-field characters which connect mascots and the law. Constitutional law and real estate law are among the legal issues related to non-costumed mascots.

### A. Constitutional Law

For many years, the Cleveland Indians’ “Chief Wahoo”—a cartoonish character originally drawn in 1947—has been criticized by American Indian groups and others for its portrayal of Native Americans.<sup>278</sup> In recent years, criticism has only grown.<sup>279</sup>

The most notable lawsuit involving Chief Wahoo began on a windy Opening Day in 1998, when several protestors burned the character’s effigy outside Jacobs Field.<sup>280</sup> When the burning effigy was sprayed with additional lighter fluid, pieces of the effigy began to blow on the sidewalk; police quickly extinguished the fire and arrested the protestors, who were detained overnight before being released without prosecution.<sup>281</sup>

275. Maddaus, *supra* note 272.

276. See *id.*

277. See *supra* notes 103–13 and accompanying text.

278. Steve Wulf, *Change Is Happening in Cleveland*, ESPN (Sept. 14, 2014), [http://espn.go.com/mlb/story/\\_/id/11574381/cleveland-indians-say-goodbye-chief-wahoo](http://espn.go.com/mlb/story/_/id/11574381/cleveland-indians-say-goodbye-chief-wahoo); see generally Jack Achiezer Guggenheim, *The Indians’ Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Mark*, 46 CLEV. ST. L. REV. 211 (1998) (tracing mascot history and describing possible challenges to mark). Many other Native American mascots have also been challenged. See, e.g., Dylan Lysen, *Mascot Issue Going to Forum*, MERCURY (Manhattan, Kan.) (Sept. 8, 2016), <http://themercury.com/articles/mascot-issue-going-to-forum> (describing proposal to replace high school’s “Indians” mascot).

279. See, e.g., Wulf, *supra* note 278.

280. *Bellecourt v. City of Cleveland*, 104 Ohio St. 3d 439, 2004-Ohio-6551, 820 N.E.2d 309, at ¶¶ 1–2. Opening Day protests have occurred for more than twenty-five years. See Mark Naymik, *Chief Wahoo Protestors More Reliable—and Hardy—Than Cleveland Indians*, CLEVELAND.COM (Apr. 5, 2016), [http://www.cleveland.com/naymik/index.ssf/2016/04/chief\\_wahoo\\_protesters\\_more\\_co.html#0](http://www.cleveland.com/naymik/index.ssf/2016/04/chief_wahoo_protesters_more_co.html#0) (“About the only thing you can count on about the Cleveland Indians is that Native American groups and others will demonstrate against the team’s name and mascot, Chief Wahoo.”).

281. *Bellecourt*, 104 Ohio St. 3d 439, 2004-Ohio-6551, 820 N.E.2d 309, at ¶ 2.

The protestors brought suit against the arresting officers, Cleveland's police chief, and the City of Cleveland for civil rights violations, but by the time the case reached the Ohio Supreme Court, only the claim against the city remained.<sup>282</sup> The court's "threshold inquiry [was] whether Cleveland violated appellees' constitutional right to free speech."<sup>283</sup> The intermediate scrutiny test of *United States v. O'Brien*<sup>284</sup> would permit such a government regulation if it was within the city's constitutional power; if it furthered an important or substantial government interest; if the interest was unrelated to the suppression of the speech; and if the restriction was no greater than essential.<sup>285</sup> Without question, burning an effigy of Chief Wahoo was constitutionally protected speech; therefore, the city could only abridge the protestors' interest in the speech if it asserted a narrowly tailored government interest.<sup>286</sup> The court found that Cleveland did indeed have an interest in preserving public safety.<sup>287</sup> When the growing fire began to blow and spread, the police were obligated to act to protect the public, and arresting the protestors was a narrowly tailored way to do so.<sup>288</sup> The court concluded: "Cleveland arrested appellees not because they burned effigies, but because of a perceived public safety threat in the manner in which they burned the effigies."<sup>289</sup> "[A]ny suppression of speech was incidental to Cleveland's important interest in preventing harm caused by fire."<sup>290</sup>

Of course, the debate over Cleveland's mascot has not ended. In 2014, perhaps building on growing controversy surrounding the moniker of the Washington Redskins,<sup>291</sup> a Native American leader announced

282. *Id.* at ¶ 3.

283. *Id.* at ¶ 4 (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978)).

284. 391 U.S. 367, 377 (1968).

285. *Id.*

286. *Bellecourt*, 104 Ohio St. 3d 439, 2004-Ohio-6551, 820 N.E.2d 309, at ¶¶ 5, 12-13.

287. *Id.* at ¶ 13.

288. *Id.* at ¶¶ 6-13.

289. *Id.* at ¶ 13. *But see id.* at ¶ 27 (Pfeifer, J., dissenting) (arguing that governmental interest in suppressing speech was minimal: "If we allow flag burning in this country, we should certainly allow Chief Wahoo effigy burning. Our flag stands for over 200 years of freedom and unity; Chief Wahoo stands for 56 years (and counting) of baseball futility.").

290. *Id.* at ¶ 5 (majority opinion).

291. See *Blackhorse v. Pro-Football, Inc.*, 2014 WL 2757516, at \*1 (T.T.A.B. 2014) (cancellation of Redskins trademarks), *aff'd*, 112 F. Supp. 3d 439 (E.D. Va. 2015), *appeal filed*, No. 15-1874 (4th Cir. Aug. 6, 2015). In 2015, California became the first state to ban the "Redskins" mascots. See CAL. EDUC. CODE § 221.3(a) (West, Westlaw through 2015 Legis. Sess.) ("Beginning January 1, 2017, all public schools are prohibited from using the term Redskins for school or athletic team names, mascots, or nicknames."); Melanie Mason, *California Schools Barred from Using 'Redskins' as Team Name or Mascot*, L.A. TIMES (Oct. 11, 2015, 2:08 PM), <http://www.latimes.com/politics/la-me-pc-redskins-mascot-banned-20151011-story.html>. It is not only Native American mascots which have been challenged on inappropriateness grounds. See, e.g., Morgan Lee, *College Drops Mascot Named for Missionaries Martyred by Native Americans*,

plans to sue the franchise in federal court for \$9 billion.<sup>292</sup> Two years later, a Canadian activist unsuccessfully sought an injunction in an Ontario court to prevent the use of the word "Indians" or the Chief Wahoo logo during the 2016 American League Championship Series.<sup>293</sup> The request was denied only hours before the Indians took the field in Toronto.<sup>294</sup> There is little question that these efforts to drag Chief Wahoo into court will continue as long as the Indians use his image.<sup>295</sup>

### B. Real Estate Law

Finally, as stadium leases and naming rights agreements have become both more common and more complex, baseball mascots have also been implicated in the context of real estate law, and in particular, how commercial leases are interpreted.

In 1986, the City of Buffalo, New York and Pilot Air Freight Corporation ("Pilot") agreed in principle to name the Buffalo Bisons' new downtown baseball stadium "Pilot Field."<sup>296</sup> The three parties subsequently executed various agreements to complete the transaction, including a lease between the city and the team and a naming rights agreement between the city and the corporation.<sup>297</sup>

In 1991, however, Pilot brought suit in federal court, alleging various

CHRISTIANITY TODAY (Apr. 11, 2016, 11:15 AM), <http://www.christianitytoday.com/gleanings/2016/april/whitman-college-drops-mascot-fighting-missionaries-martyred.html> (Washington college's "Missionary" mascot found not to be "appropriately inclusive and welcoming"); *Fort Smith Attorney Ends Rebel Fight, Plans Appeal of FOIA Ruling*, TIMES REC. (May 27, 2016, 5:12 AM), <http://swtimes.com/news/fort-smith-attorney-ends-rebel-fight-plans-appeal-foia-ruling> (Arkansas high school's "Rebels" mascot replaced with "Mavericks").

292. Mark Axisa, *Native American Group Planning \$9 Billion Lawsuit Against the Indians*, CBSSPORTS.COM (June 25, 2014), <http://www.cbssports.com/mlb/news/native-american-group-planning-9-billion-lawsuit-against-the-indians/>. The suit was apparently never brought.

293. Jeff Gray, *Ontario Court Denies Bid to Block Cleveland Indians Name, Logo*, GLOBE & MAIL (Toronto) (Oct. 17, 2016, 2:08 PM, updated 10:18 PM), <http://www.theglobeandmail.com/sports/baseball/use-of-cleveland-indians-name-and-logo-challenged-in-ontario-court/article32392221/>.

294. *Id.* At this writing, related claims were still pending in the Ontario Human Rights Commission and the Canadian Human Rights Tribunal. David Waldstein, *Battle over Indians' Name and Logo Moves to the World Series*, N.Y. TIMES (Oct. 22, 2016), [http://www.nytimes.com/2016/10/23/sports/baseball/cleveland-indians-native-americans-world-series-protest.html?\\_r=0](http://www.nytimes.com/2016/10/23/sports/baseball/cleveland-indians-native-americans-world-series-protest.html?_r=0).

295. For a description of potential challenges, see generally John R. Wallace, Note, *Discriminatory & Disparaging Team Names, Logos & Mascots: Workable Challenges & the Misapplication of the Doctrine of Laches*, 12 RUTGERS RACE & L. REV. 203 (2011).

296. *Pilot Air Freight Corp. v. Buffalo*, No. CIV-91-308E, 1991 U.S. Dist. LEXIS 18600, at \*1-4 (W.D.N.Y. Dec. 16, 1991).

297. *Id.* at \*3-5.

violations of the agreements.<sup>298</sup> Among other claims, Pilot argued that the team attempted to rename the stadium by placing the name "Bisons" and a logo of its mascot "Buster Bison" on the back of the stadium scoreboard.<sup>299</sup> After examining the naming rights agreement, the court ruled that no breach occurred:

[T]he depiction of "Buster Bison" along with the word "Bisons" on the back of the scoreboard does not constitute a violation thereof. The Naming Rights Agreement sets forth specifically Pilot's rights to have its name displayed within and without the stadium. Such provisions of the Naming Rights Agreement have been fully complied with . . . .<sup>300</sup>

Although this particular claim was dismissed, litigation continued for several years until the stadium was eventually renamed in 1995.<sup>301</sup>

Because the Angels franchise has no official costumed representative, its mascot-related legal troubles have centered on the name of the mascot itself. The expansion team that began as the Los Angeles Angels in 1961 changed its name to the California Angels near the end of 1965.<sup>302</sup> After entertainer Gene Autry sold the team to the Disney Company in 1996, the City of Anaheim renovated the stadium and the stadium lease was revised to state: "Tenant will change the name of the Team to include the name 'Anaheim' therein, such change to be effective no later than the commencement of the 1997 Season."<sup>303</sup> The team—now called the Anaheim Angels—was sold again in 2005, and the new owners renamed the team as the Los Angeles Angels of Anaheim.<sup>304</sup> Although the new name—in which the mascot name precedes the city

298. See *id.* at \*1–2.

299. *Id.* at \*4–5. Pilot argued that the franchise should be held liable as a third-party beneficiary of the naming rights agreement, because the lease between Buffalo and the Bisons incorporated the naming rights agreement between Buffalo and Pilot. *Id.*

300. *Id.* at \*15.

301. See Budd Bailey, *This Day in Buffalo Sports History: Pilot Field Grounded*, BUFF. NEWS: SPORTS, INK (Mar. 2, 1995, updated Mar. 2, 2010, 12:14 AM), <http://sportsink.buffalonews.com/2010/03/02/this-day-in-buffalo-sports-history-pilot-field-grounded/>.

302. See *Los Angeles Angels of Anaheim Team History & Encyclopedia*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/teams/ANA/> (last visited Oct. 10, 2016).

303. *City of Anaheim v. Angels*, No. G037202, 2008 Cal. App. Unpub. LEXIS 10284, at \*5–7 (Cal. Ct. App. Dec. 19, 2008).

304. *Id.* at \*8. See Press Release: *Angels Baseball Announces Official Name Change*, MLB.COM (Jan. 3, 2005, 11:07 AM), [http://losangeles.angels.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20050103&content\\_id=926747&vkey=pr\\_ana&fext=.jsp&c\\_id=ana](http://losangeles.angels.mlb.com/news/press_releases/press_release.jsp?ymd=20050103&content_id=926747&vkey=pr_ana&fext=.jsp&c_id=ana) (name change to strengthen team's long-term economic health and enhance marketability).

designation—was unusually creative,<sup>305</sup> it was permitted under the stadium lease, which had been assumed by the ownership group.

The City of Anaheim quickly filed suit, asking for a preliminary injunction to stop the name change, but the preliminary injunction was denied at the trial and appellate level.<sup>306</sup> In 2008, another appeals decision upheld the jury's decision to allow the name change, despite arguments that Disney and the Angels had intended only for the name Anaheim to appear in front of the mascot name.<sup>307</sup> After the team and the city were unable to negotiate a new lease which, among other things, would allow the team to drop the "of Anaheim" name,<sup>308</sup> the Angels walked away from talks in 2014, leaving the future name (and home) of the team unsettled.<sup>309</sup>

## VII. CONCLUSION

For more than fifty years, baseball mascots have been employed to entertain fans, bring value to franchises, and even distract attention from unsuccessful teams. As mascots remain a part of baseball's future, they will undoubtedly continue to bring new legal issues to America's pastime and reflect the intersection of baseball and the law.

305. *City of Anaheim v. Superior Court of Orange Cty.*, No. G035159, 2005 Cal. App. Unpub. LEXIS 5625, at \*43 (Cal. Ct. App. June 27, 2005) (Sills, P.J., concurring) ("When this contract was made in 1996, no major league baseball team had ever been named using the formula of a location modifier followed by a mascot name followed by yet another location modifier."). See also *id.* at \*46 ("To put both cities in the same team name is to be mutually contradictory. To put Los Angeles before the mascot designation (Angels) is to effectively remove Anaheim from the name.").

306. See *id.* at \*2, \*4–5 (majority opinion).

307. See generally *Angels*, 2008 Cal. App. Unpub. LEXIS 10284, at \*15–17, \*30–33, \*81.

308. Bill Shaikin, *Frustrated Angels End Talks with Anaheim on Stadium Lease*, L.A. TIMES (Sept. 26, 2014, 6:46 PM), <http://www.latimes.com/sports/angels/la-sp-angels-move-anaheim-20140927-story.html>; Bill Shaikin, *Anaheim OKs Angels Lease Talks Amid Mention of Team's Ability to Move*, L.A. TIMES (Sept. 3, 2013, 11:04 PM), <http://www.latimes.com/sports/angels/la-sp-angels-stadium-20130904-story.html#axzz2dxSNPbiu>.

309. See Bill Shaikin, *Frustrated Angels End Talks with Anaheim on Stadium Lease*, L.A. TIMES (Sept. 26, 2014, 6:46 PM), <http://www.latimes.com/sports/angels/la-sp-angels-move-anaheim-20140927-story.html>; Andre Mouchard, *Angel Stadium at 50: Call It 'The Big Aged'; Does It Have a Future?*, ORANGE COUNTY REG. (Apr. 2, 2016, updated Oct. 19, 2016, 11:32 AM), <http://www.ocregister.com/articles/stadium-710624-angels-angel.html>.